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Culture and competition policy in the European Union: Interplays and tensions

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Abstract

"If I had to do it all over again, I would begin with culture". This well-known apocryphal quote, attributed to the Father of the European Union Jean Monnet, sheds light upon the pivotal role played by culture within the European integration process, which has been often reduced to merely political or economic aspects.

Exactly with the aim of investigating the tensions potentially arising from these two different – although complementary – perspectives on European integration, this dissertation focuses on the complex dynamics between one of the pillars of the EU economic constitution, namely competition policy, and cultural policy, the latter being in principle based on a paradigm completely different from the economic one but pursuing goals which are nevertheless worth achieving, as also showed by the introduction of the so-called cultural mainstreaming clause, according to which the Union shall take cultural aspects into account in its action under other provisions of the Treaties.

More specifically, in the attempt to understand whether it is possible to find room for coexistence, and even for synergies, between such different fields of the European action, the integration of cultural considerations both in the public side of competition law – namely State aid discipline – and in its private side – namely mergers control and antitrust rules – will be thoroughly investigated, also in order to see whether the economic paradigm traditionally adopted when enforcing competition law could be deemed to be adequate to take into account the specificity of the cultural sector.

Such an analysis will follow a legal, political and economic approach, and will tackle such issues by bridging doctrinal analysis, normative reflection, case-law scrutiny and review of the Commission's decision-making practice, and that in order not to overlook the practical component of competition rules enforcement in order to assess how cultural and economic interests are balanced.

Also, to offer new perspectives on the topics addressed by the dissertation, the scope of the latter will be broaden up by adding some references to the so-called geo-blocking practices, in order to tackle issues which cannot be directly reconnected to the mere relationship between culture and competition but nevertheless appear to be relevant to underline possible new synergies between the cultural mainstreaming clause and antitrust provisions in the digital age.

INTRODUCTION

"United in diversity", namely the motto of the European Union which came into use in 2000, stresses the idea of unity without uniformity at the basis of the Union and, consequentially, the everlasting relevance of national cultures, which therefore need to be preserved.

The same motto, however, in spite of its outward simplicity, apart from the open question regarding the concrete meaning to be given to it[1] and from its consequences in terms of integration process' success[2], if analysed from a purely cultural policy perspective hints to a tension between supranational and national level which follows European integration from its very beginning, from the first attempts at vesting the Union with a cultural competence of its own, in the light of Member State's jealousy towards cultural policies, the latter at the beginning regarded as a mainly national task.

Besides this conflict between levels of government, which can be nowadays considered smoothed out by the introduction – with the Maastricht Treaty – of the Union's supporting competence in the cultural field, enshrined in Art.167 TFEU, it is possible to detect other additional frictions, not directly related to the division of competences between Union and Member States but rather to the different goals pursued by cultural policy on the one hand and policies aiming at ensuring the smooth functioning of the internal market on the other, showing an inevitable tension between economic and non-economic interests.

Specifically focusing on competition law – namely one of the pillars of the European economic constitution, which, as it has been underlined[3], shall be at the same time embedded within the social market economy, already showing its "double nature" –, the present work aims at exploring the interplay between the latter and cultural considerations. More specifically, by crossing and bridging together normative reflection, case-law scrutiny, review of the Commission's decision-making practice and doctrinal analysis – the latter referring mainly to classical competition law studies on non-economic concerns of competiton law and to works on cultural policy and governance in the EU, less and more recent in order to give account of the significant evolution in such fields – , this dissertation tries to clarify

[1] See VON BOGDANDY, A., *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship*, in *European Journal of International Law*, 2008, vol. 19, issue 2, 241-275.

[2] For example, KRAUS, P.A., *Cultural Pluralism and European Polity-Building*, in *Journal of Common Market Studies*, 2003, vol. 41, issue 4, 665-686, sheds light on the great reservations towards the Union caused by the concern for cultural diversity.

[3] See GERBRANDY, A., *Rethinking Competition Law within the European Economic Constitution*, in *Journal of Common Market Studie*s, 2019, vol. 57, issue 11, 127-142.

the extent to which cultural concerns can influence competition enforcement and in the attempt to tackle a fundamental research question: are culture and competition bound to be sworn enemies or there is also room for coexistence or even synergies between them? Also, is the economic paradigm traditionally adopted when enforcing competition law adequate to take into account the specificity of the cultural sector?

Such matter, which represents the core of this research, appears to be tightly intertwined with the broader issue related to the relationship, within the EU, between the more traditional economic objectives and the non-economic ones, which – although at times pursued through a "hidden agenda", as in the case of cultural aims here at stake – were explicitly acknowledged only at a later stage of the integration process. Indeed, such non-economic goals – cultural diversity and cultural heritage protection included – started to gain increasing relevance from the 1987 Single European Act and were enshrined as proper general objectives only through the reform of Art. 3 TEU, thus abandoning their status as aspirations of general political nature – consequentially contained within the preamble – and becoming proper goals to be pursued by the EU.

However, the relevance of Art. 3 TEU notwithstanding, doubts might arise first of all as to whether the non-economic interests are then concretely taken into account or are doomed to play a minor part within the EU institutions' action, but also as to whether, once introduced the idea of an internal market employed to pursue broader public policy goals, the latter can maintain their non-economic intrinsic nature or the economic paradigm is bound to have the upper hand.

While a number of studies has been over the years devoted to the analysis of the dynamics between the internal market's functioning and the achievement of public policy objectives[4], less attention had been in the past paid to the main instrument used to create an internal market free from barriers and distortion of competition. This is the reason behind the choice to focus on the interplays between culture and competition law, the latter appearing capable of offering – through an analysis of State aid, anticompetitive agreements and mergers – interesting insights on the possibility of using a tool traditionally based on an economic paradigm to pursue aims which are potentially conflicting with such paradigm and which shall be nevertheless achieved through the internal market that competition law itself aims at creating.

Given the need to frame the specific question addressed by this dissertation within the debate between economic and non-economic objectives, it appears first of all important to see when and how the specific kind of non-economic consideration here at stake – namely the cultural one – started to emerge in the EU

[4] See for example B. DE WITTE, *Internal market legislation as European public policy*, in *Revista de Derecho Comunitario Europeo*, 2025, n. 80, 11-17.

integration process. In the light of that, the first Chapter will for starters try to give account of the evolving role of culture within the European project, and that for a twofold purpose: first of all to examine the path which led to the introduction of Art. 167 TFEU – which for the first time vested the Union with a formal cultural competence and therefore represents a cornerstone of this research, especially because of the cultural mainstreaming clause contained in its fourth paragraph – but also to shed light on the fact that EU Institutions seem at time somehow recalcitrant to acknowledge purely cultural goals, on the contrary highlighting for example the economic spillovers of cultural activities. This aspect appears to be rather instructive in the present work, and that because it hints to an instrumental conception of culture which might make the latter more permeable to different considerations, such as economic ones, and above all – in a field, such as the one of cultural products and initiatives, in which the economic and the non-economic dimensions already coexist – might even more overshadow the specificities of the cultural sector, which are not fully acknowledged neither when the latter is addressed in competition law enforcement.

In the second Chapter, in the attempt to better understand the overall scenario in which the dynamics between competition law and cultural interests unfold, the deep reasons behind a possible conflict between the two will be addressed. More specifically, after a brief analysis of the removal of the undistorted competition principle from Art. 3 TEU, meant to clarify whether – after such modification – its weight within the overall system significantly changed, the so-called policy linking clauses will be introduced, in order to underline how, if on the one hand the European Institution's duty to find a balance between competition and different non-economic considerations – already suggested by the new version of Art. 3 TEU – has been formalised through the introduction of such provisions, on the other hand no clear guidelines to follow when applying them have been provided, making the balancing exercise between different interests particularly complex. Also, after having touched upon the wide range of competition law's goals, in order to shed light on its sponge-like features, the focus will move to the actual possibility for non-economic interests to justify exemptions from the application of competition law provisions, and that through the aforementioned policy-linking clauses. Here, reference to the potential issues arising from the resort to the cultural mainstreaming clause, implying the duty to take into account a national and not European interest, will be also made. Finally, a brief reference to the trade and culture debate at the international level will be made, more specifically in order to see which stance the EU adopted within the forum of the World Trade Organisation when negotiating the cultural exception and – at a later stage – in the context of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Even though falling outside the scope of this dissertation, this foray at the international level might prove to be rather useful to show a shift, even when addressing the relationship between trade and culture – which can be considered the international counterpart of the one between competition and culture at the EU level – from the negative approach exemplified by the use of exceptions to a positive one, based on a more frequent use of integration clauses, always given the need to bear in mind the complementarity existing between such approaches.

Moving then from the framework's critical reconstruction to the core of the research, namely the practical side of the interplays between competition law and cultural considerations, special attention will be first of all devoted, in the third Chapter, to State aid in the cultural sector, in order to try to answer to the question on the possibility of finding room for coexistence between State aid rules and public support to the cultural sector – a rather common feature of Member States – as well as on the same rules' capability to adequately consider the specificities of the latter.

The State aid case appears to be rather significant, not only because of the existence of an *ad hoc* derogation – namely Art.107(3)(d)TFEU – aiming at declaring compatible with the internal market public support measures to the cultural sector, but also because of a tendency shown by the Commission not to be completely ready to acknowledge the specificities of the latter. This clearly emerges from the fact that, rather often, measures considered compatible on the basis of the aforementioned cultural derogation do not seem to fall within the scope of State aid discipline at all, and that because of their non-economic nature. The latter is not fully recognized by the Commission, which seems more prone to declare support measures compatible with the internal market than to consider them as falling outside Art.107(1) TFEU[5], thus limiting the scope of the State aid prohibition. Also, in order to give a brief account of the Commission's decisional practice with regard to another sector characterised by a mingling of economic and non-economic aspects, State aid to sport will be addressed.

However, the dynamics between competition enforcement and cultural considerations shall not be read only in terms of opposition and – therefore – as in need for explicit exemptions to ensure the coexistence between them: to this end, the fourth and last Chapter moves from State aid discipline to the other two branches of competition, namely merger control and antitrust, in order to see whether some kind of complementarity between competition policy and safeguard of cultural diversity can be detected. Interestingly, while in the first case the link between an efficient merger control and a diversified offer seems to be rather straightforward – if certain condition are fulfilled –, when anticompetitive agreements are at stake Member States are more prone to justify derogations from

[5] "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

Art. 101 TFEU[6] in order to safeguard cultural diversity, while in the Commission's perspective there is no tension between antitrust rules and cultural diversity objectives, being the latter already pursued through the former: this is the case of resale price maintenance schemes in the publishing sector.

The work then closes with a focus on a topic which might appear *prima facie* less consistent with the other components, namely the territorial restrictions that European audiences are experiencing when accessing cross-border copyrighted content, especially audiovisual. These are the so-called geo-blocking practices, put in place by traders operating in one Member States to restrict access to their online interfaces to users located in a different Member States, with the aim of safeguarding the territoriality of copyright, often violating Art. 101 TFEU.

This case appears to be rather interesting not only because it sheds light on the tension between the territoriality of copyright and antitrust rules, with the latter at times succumbing, but also and foremost because of its impact on European audiences' cross-border access to cultural contents. Moving now back to the EU motto quoted at the beginning, it appears worth recalling how, besides the prominence of diversity, relevance is also acknowledged to the element of unity. The restrictions to cross-border access – and therefore to the circulation among European users – to and of cultural contents originating from the various Member States might be then considered to a certain extent as impacting on the process of creation of a new European culture, to be placed besides national ones, in coherence with the idea of unity in diversity, also in order to foster a feeling of "Europeanness"[7]: it remains to be seen whether antitrust rules will in the future play some kind of role in ensuring cross-border access, with the Commission applying Art. 101 TFEU to the detriment of the copyright's territoriality, and most of all whether cultural considerations will have a weight in the Commission's evaluations, and that in the light of the reference to a common cultural heritage to be brough to the fore in Art. 167 TFEU.

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[6] This provision prohibits, as incompatible with the internal market, all agreements between undertakings, decisions by associations of undertakings as well as concerted practices which may affect trade between Member States and which prevent, restrict or distort competition within the internal market.

[7] The difference between strong and deeply rooted national cultures and a weaker, still in fieri Europeanness is underlined by N. BASARABA, *Cross-comparing the Concept of "United in Diversity" as Expressed by European Capitals of Culture*, in *Journal of Intercultural Communication Research*, 2023, vol. 52, issue 4, 357-368, 360.

Chapter I - European Union and cultural sector, from the Treaty of Paris to the Treaty of Maastricht: the stages of a deep-rooted relationship

Although a proper competence in the cultural field was formally ascribed to the European Union only in 1992[8] after the Treaty of Maastricht, culture represented, from the very beginning, the object of an implicit agenda[9], for a twofold reason: first of all, because of its role in shaping a European identity[10], but also in view of the unavoidable inclusion of cultural products within the scope of common market's rules[11].

To give account, in a historical perspective, of the evolution of the Community's perspective on the cultural sector which finally led to acknowledge the relevance of the latter, soon requiring EU Institutions to carry out a balancing exercise between the new cultural interests and the traditional economic ones, the following analysis will start from an overview of different soft law documents, such as declarations, European Parliament's and Council's resolutions, Commission's communications, in the attempt to show the wavering approach, at times characterised by sudden surges followed by more cautious stances, of Community's Institutions towards culture before 1992, to move then – after of an overview of the positive measures

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[8] We are referring here to the year in which the Treaty was signed, not to the one in which it entered into force (1993).

[9] In these terms PSYCHOGIOPOULOU, E., *The Integration of Cultural Considerations in EU Law and Policies*, Leiden, Brill, 2007, at 8.

[10] About the connection between cultural policy, integration and European identity see, among others, SASSATELLI, M., *Imagined Europe. The Shaping of European Cultural Identity*, in *European Journal of Social Theory,* 2002, vol. 5, issue 4, pp. 435-451, MATTOCKS, K., *Uniting the Nations of Europe? Exploring the European Union's Cultural Policy Agenda*, in DURRER, V., MILLER, T., O'BRIAN, D. (eds), *The Routledge Handbook of Global Cultural Policy*, London, Routledge, 2017, pp. 397-413. More generally, on the possibility to use culture as technique for State-building, see HOBSBAWM, E., RANGER, T. (eds), *The Invention of Tradition*, Cambridge, Cambridge University Press, 1983, ANDERSON, B., *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London, Verso, 1983.
However, it also appears worth recalling from the outset that the efforts made by European institutions over the years were not meant to shape a European cultural identity replacing national ones, on the contrary to establish the "unity-in-diversity" paradigm (in this way placing great relevance on the idea of cultural diversity). On the repercussions of this paradigm in terms of legitimacy, see PANTEL, M., *Unity-in-Diversity: Cultural Policy and EU Legitimacy,* in BANCHOFF, T., SMITH, M.P., (eds), *Legitimacy and the European Union: The Contested Polity*, London, Routledge, 2005.

[11] As significantly affirmed by the Commission in the 1977 Communication *Community Action in the Cultural Sector*, COM (77) 560 final, which will be examined later, "Most Community action in the cultural sector is nothing more than the application of the EEC Treaty to this sector. This involves freedom of trade, freedom of movement and establishment, harmonization of taxation systems and legislation. The legal basis is the Treaty itself".

adopt to support the cultural sector and of the European Court of Justice's attempt to include cultural considerations in its case law – to the introduction of Art. 128 TEC (now Art. 167 TFEU), whose interaction with competition law will be investigated in the present work.

Such reconstruction – which appears fundamental to adequately frame the issue at stake in the present work – will be followed by a brief remark on the tendency, emerging especially from the recent initiatives undertaken at the EU level and examined in the first part of the Chapter, to consider cultural policy in an instrumental perspective, as a tool to achieve other goals. This aspect – for the sake of the present work – appears interesting for a specific reason: indeed, it might in the long-term lead to neglect the cultural sector's distinguishing features – something which, as it will be underlined in the following Chapters, might also happen when applying the competition law's economic paradigm – in this way exacerbating the already complex coexistence of the economic and the non-economic component which is rather clear especially when cultural industries are at stake.

1. The pre-1992 scenario

1.1 Between reluctance, unavoidability and need to foster a common identity: the first Community's forays in the cultural sector

A first hint to the Community's interest towards the cultural sector can be already detected in the Treaty of Paris of 1951, in which a reference to the willingness to "establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts" is made, therefore underlining – not for the last time[12] - the instrumentality of the economic dimension, not to be considered a goal in itself but on the contrary a tool to build a community made up of different peoples and different cultures.

However, a more explicit mention of the cultural sector can be found within the Official communiqué adopted by the Heads of State or Government at the end of the Bonn Conference in July 1961[13]: more specifically, what emerges from this document is an anxiousness "to strengthen the political, economic, social and cultural ties" between the peoples of Europe – the ones making the Community "an exceptional seat of development, of progress and culture"[14] to preserve and not only an economic entity - to be then complemented, at the practical level, by a

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[12] In the same terms see for example the *Statement from the Paris Summit* of October 1972, 10 Bull EC (1972) 14, where the Heads of State and Government of the Member States significantly affirm that "Economic expansion is not an end in itself". In this document it was also affirmed that "As befits the genius of Europe, particular attention will be given to intangible values", probably referring to cultural aspects too.

[13] 7/8 Bull EC (1961) 35.

[14] In these terms see the *Final communiqué of the Hague Summit*, I Bull. EC (1970) 11.

cooperation in the cultural field[15].

These documents issued in the 1960s were then aiming to underline the multifaceted nature of the newborn Community, in the attempt to shed light on a more complex idea of integration apart from the economic one, but they did not make reference to a concept which would have become increasingly debated over the years: the one of identity, which on the contrary became a tool to cope with the obstacles to integration that the Community had to face during the 1970s, when the first tensions between economic interdependence and national interests started to emerge[16], and represents the core of the *Declaration on European Identity*[17], stemming from the 1973 Copenhagen Summit. In the attempt to "define the European identity with the dynamic nature of the Community in mind", the latter relates the need to develop further the construction of a united Europe and the one to safeguard the variety of national cultures, which, together with other factors such as common values and principles, "give the European Identity its originality and dynamism".

Once clarified the integration's ultimate goal and the role of culture in shaping a common identity, given that, however, the need to develop a Community action in the cultural field was already underlined in the 1972 Commission's *Memorandum pour une action Communautaire dans le domaine de la culture*[18], the European Parliament was

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[15] "The cooperation of the Six must go beyond the strictly political field, and will in particular be extended to the sphere of education, of culture, and of research, where it will be ensured by periodical meetings of the Ministers concerned". As recalled by MISSIR DI LUSIGNANO, L., *Communauté ed culture*, in *Revue du Marché commun et de l'Union européenne*, 1994, issue 376, the need for cultural cooperation was already emerging from report drafted in 1963 by a former member of the European Parliament, Leo de Block, which put on equal footing economic and social action and cultural one.

[16] More specifically, according to DE WITTE, B., *Building Europe's Image and Identity,* in RIJKSBARON, A., ROOBOL, W. H., WEISGLAS, M. (eds), *Europe from a Cultural Perspective*, The Hague, Nijgh & Van Ditmar Universitair, 1987, at 133, "many obstacles in the way of further integration might be overcome if there were a popularly held feeling of a European interest which could be effectively opposed to short term sectional interests within Europe: if, in other words, the European Community could be turned into a real community. And such a feeling of loyalty, in turn, seemed to require some sense of identity".

[17] 12 Bull. EC (1973) 118.

[18] SEC(72)4250. Here reference was in particular made to multiculturalism, cultural exchanges ("les échanges culturels permettent aux peoples – tant à l'extérieur qu'à l'intérieur de la Communauté – de vivre réellement l'élargissement", p.1), and most notably - in coherence with the 1973 Declaration – to the key role of culture in building a Community with which European citizens could identify themselves ("quoi s'ajoute que, en facilitant l'accès du plus grand nombre à la culture, la Communauté conférerait un caractère plus humain à la construction de l'Europe et que, de cette façon, elle y intéresserait davantage les Européens. Jusqu'ici, ils restent à peu près indifférents aux activités communautaires. Ces activités, qui tendent au développement économique et au progrès social, les concernent pourtant directement; mais elles leur paraissent ésotériques"). With regard to the two main elements of Community's action in the cultural field, the latter would have been based – in the Commission's perspective – on the application of the EEC Treaty (in coherence with the 1977 Communication which will be analysed later) and on cooperation between Member States.

the first actor to develop practical measures in favour of the cultural sector[19]: more specifically, through a resolution adopted in May 1974[20] on the protection of the European cultural heritage[21], attention was paid not only to the safeguard of the latter but also to the free exchange of cultural works and circulation of cultural workers, while in a second resolution dating back to March 1976[22], the relevance of cultural exchanges[23] and dissemination[24] - to be ensured by promoting for example the translation of literary works - was underlined.

Both these resolutions, together with the aforementioned summits' statements and the 1975 Tindemans' *Report on European Union*[25] - the latter once again using culture as a tool to build an image of Europe with which European citizens could identify[26] - led to the publication in 1977 of the Commission's communication *Community action in the cultural sector*[27], addressed to the European Council.

Unsurprisingly, and in coherence with the 1974 resolution's focus on cultural goods' trade and cultural workers' circulation, this document did not vest the Community with a power to develop a proper cultural policy: on the contrary, after providing a definition of cultural sector[28], it specified that its action should have been necessarily "centred on solving the economic and social problems which arise

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[19] Also, it appears important to recall that in the same years a 'Cultural problems' division and a department responsible, amongst other matters, for protecting cultural heritage, were established within the Commission of European Communities.

[20] OJ C 62, 30.5.1974

[21] The definition – or rather the lack of a definition – of cultural heritage at the EU level will be addressed hereinafter; for now, what appears interesting to underline is that, as emerging from the report presented by Lady Elles - on behalf of the Committee on Cultural Affairs and Youth - in the European Parliament's sitting of 13 May 1974, the resolution here at stake accepts a broad definition of cultural heritage – more specifically the one contained in Art. 1 of the 1970 UNESCO International Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property – including not only buildings, sites and monuments (the ones falling within the definition provided by the 1972 UNESCO Convention concerning world's cultural and natural heritage), but also antiquities, archaeological excavations, pictures, paintings, statue, rare manuscripts, archives and furniture.

[22] OJ C 79, 5.4.1976.

[23] There is once again reference to the concept of identity: indeed, "[The European Parliament] is of the opinion that the promotion of cultural exchanges of every type is an excellent means of making the citizens of the Community more aware of European identity".

[24] The relevance of access to culture was also listed among the future objectives of the Europe of the 1980s as suggested by the 1973 *Rapport relative aux objectifs et options de la politique de recherche scientifique et de développement technlogique,* which, at p. 602, mentions "[la] qualité de l'environnement culturel, [l'] accès des masses à la culture".

[25] Bull. EC (1976), Supplement 1/76.

[26] "No one wants to see a technocratic Europe. European Union must be experienced by the citizen in his daily life. It must make itself felt in education and culture, news and communications, it must be manifest in the youth of our countries, and in leisure time activities".

[27] European Commission, Communication *Community action in the cultural sector*, Bull. EC (1977), Supplement 6/77.

[28] Which is defined as the "socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services", not to be confused with the more general concept of culture.

in this sector as in all others"[29], therefore not fully acknowledging the specificities of the cultural field[30] but developing practical measures meant to create a "more propitious economic and social environment"[31] by taking steps in areas such as trade in cultural goods, illicit trafficking, freedom of movement and establishment for cultural workers, taxation, copyright law. At the same time, even if – as specified by the *Communication* – Community action could not be regarded as a cultural policy[32], this specific sector was also object of a more immediate interest, not mediated by socio-economic considerations and directly aiming to safeguard cultural heritage and promote cultural exchanges: in this case, the legal basis of Community's action could not be found in the Treaties[33], but rather in the aforementioned 1974 and 1976 resolutions.

This cautious approach notwithstanding, also due to the Member States' recalcitrance to vest the Community with a proper cultural competence[34], the 1970s paved the way for a greater interest in this field[35], therefore requiring new measures to be adopted, in order not to treat culture as deserving "no more than a passing reference in Sunday sermons" and then dismiss it "with a shrug of the shoulders during the rest of the week"[36]. In a moment in which the need to revitalize the European project was particularly urgent, the cultural element once again was deemed to play a key role[37] and, from a more practical perspective, the resources set aside for this sector significantly increased in less than a decade[38]: in this context the new 1982 Commission's Communication *Stronger Community action in the cultural*

[29] *Community action in the cultural sector*, at 5.
[30] Even if the Commission clarifies that those economic and social issues might be more severe in this particular sector.
[31] *Community action in the cultural sector*, at 5.
[32] *Ibid.*
[33] This was later explicitly affirmed by the European Parliament in its Resolution embodying the opinion of the European Parliament on the communication from the Commission of the European Communities to the Council concerning Community action in the cultural sector (OJ C 39, 12.2.1979), where it affirmed that "the Treaty establishing the Community provides a necessary and sufficient legal basis for Community action in the cultural sector".
[34] See CRAUFURD SMITH, R., *Community Intervention in the Cultural Field: Continuity or Change?* In CRAUFURD SMITH, R. (eds), *Culture and European Union Law*, Oxford, Oxford University Press, 2004, at 21.
[35] According to BLIN, M. *L'Europe et la Culture*, Paris, Sénat, 2001, p.7, the Community's action in the cultural field began with the creation of a budget item entitled "expenditure on cultural projects" in the 1970s.
[36] In these terms BRUGMANS, H., *Towards a European Cultural Policy*, Brussels, Publication of the European Cooperation Fund, 1978, at 1.
[37] See for example the draft *European Act* arising from an Italian-German initiative (Bull. EC 11-1981, at 3.4.1), where "close cultural cooperation between the Member States in order to promote an awareness of common cultural origins as a facet of the European identity" is listed among the principles to be followed in reinforcing the Community, and the *French Government memorandum on revitalization of the Community* (Bull. EC 11-1981, at 3.5.1).
[38] More specifically, they went from 20 700 EUA in 1976 to 706 500 ECU in 1982.

sector[39] was published.

Once more, the Commission drew attention to the limited role of the Community, restricted to ensuring free trade of cultural goods, improvement of cultural workers' living and working conditions, widening of the audience and conservation of the architectural heritage, also in order to avoid overlapping with governments' or international organisations[40]' responsibilities. More specifically, it recalled – as in the 1977 Communication – the mediated value of culture, falling within Community's authority because of its economic and social positive externalities, the latter considered as the legal justification for heritage conservation activities[41], being on the contrary the cultural justification of them self-evident in the Commission's perspective[42]. In the light of these aspects, this new Communication might appear as a duplicate of the 1977 one, however it also introduced some interesting novelties, somehow forestalling the innovations launched by the 1992 Maastricht Treaty. In particular, what emerges is a reference to the new concept of "Community heritage" – not replacing but complementing national ones, "indicating that works taken to another Community country will less and less be felt as a loss to the country of origin[43]" – together with what can be somehow considered as a glimpse of the current Art. 107(3)(d) TFEU, namely the so-called cultural derogation to state aid discipline, which will be deeply analysed in the following chapters. Indeed, according to the Commission, in the audio-visual sector "aid schemes to encourage the development of national productions may exist, provided that they do not contravene the basic rules of the EEC Treaty": despite the lack of an explicit reference to the distortion of the competition and to the potential compatibility of certain aids with the internal market, this point made by the Commission seems to be already hinting at one of the main issues addressed by the present work, namely the compatibility between competition law and support measures to the cultural sector, touching upon a very sensible issue such as the

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[39] European Commission, Communication *Stronger Community action in the cultural sector,* Bull. EC (1982), Supplement 6/82.

[40] Here the reference is mainly to the Council of Europe and to UNESCO, whose action was already recalled in the 1977 Communication. More in detail, the Communication here analysed affirms that "The Commission considered, and still considers, that Community action in the cultural sector should be both complementary and subsidiary to what was already being done internationally. There is therefore no duplication with the efficiently run activities of organizations like the Council of Europe, for which the development of culture is a prime objective".

[41] *Stronger Community action,* at 13: "The point to stress is rather that the legal basis for the Community's contribution to preserving this heritage lies in the fact that it is a contribution to a rich resource that generates economic activity (tourism, scientific research, art publishing, etc.) and that conservation is itself an economically and socially viable activity for the firms and workers connected with it".

[42] *Ibid.:* "There is no need to dwell upon the cultural justification for conserving the architectural heritage, given the splendour of that heritage in the Community and the value that Europeans attach to it".

[43] *Ibid.,* at. 8.

peculiar nature of certain products, cultural and commercial at the same time[44].

In coherence with the *Solemn Declaration on European Union*[45], signed in Stuttgart by the Heads of State or Government on 19 June 1983 and underlining the relevance of a promotion of closer cooperation on cultural matters "to the extent that these activities cannot be carried out within the framework of the Treaties", the idea of a codification of Community's action in the cultural field started to emerge: more specifically, the Parliament, with the aim of bringing about a reform of the Community institution, adopted in 1984 a Draft Treaty on the European Union[46], containing a provision specifically devoted to cultural policy[47]. In the same years, particular attention was paid also to the financial support for the latter, as emerging from the 1983 Parliament's resolution *on stronger Community action in the cultural sector*[48], and many concrete actions in support of culture were carried out mainly through resolutions – having diversified objects, ranging from very symbolic measures, such as the creation of the European city of culture, to more practical ones, aiming for example at guaranteeing special condition of admission for young people to museums[49] – in large part adopted by the Ministers responsible for Cultural Affairs meeting within the Council, in order to avoid delicate problems related to the

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[44] This also emerges from the 1982 European Parliament Resolution *on national financial aids to film-makers* (OJ C 87, 5.4.1982) Here, the Parliament, "aware that a policy which interpreted the text of the EEC Treaty in a manner systematically favourable to commercial interests would inevitably lead to the suffocation of cultural expression in the various countries and the strengthening of the large film companies and would be detrimental to the expression of the diversity of national cultures which constitute the richness of European cinema", encourages the Commission "to review its position on the elimination of national aids considered to be discriminatory".

[45] 6 Bull EC (1983) 24.

[46] European Parliament, *Draft Treaty on the European Union*, OJ C 77, 19.3.1984.

[47] *Ibid.*, Art. 61, according to which:

1. The Union may take measures to:
   - promote cultural and linguistic understanding between the citizens of the Union,
   - publicize the cultural life of the Union both at home and abroad,
   - establish youth exchange programmes
2. The European University Institute and the European Foundation shall become establishments of the Union.
3. Laws shall lay down rules governing the approximation of the law of copyright and the free movement of cultural works.

[48] OJ C 342, 19.12.1983, at 127. "[The European Parliament] stresses the need to allocate adequate financial resources to the Community's action in the cultural sector and therefore requests the Commission and the Council to carry out a verification of the financial instruments and resources available or which need to be proposed for this purpose; Considers that the allocation to the cultural sector of 1% of the Community budget constitutes a realistic objective which it is necessary to attain within a reasonable period, and recommends that the Member States allocate the same percentage of their own budgets to it".

[49] See for example the Resolution *on greater recourse to the European Social Fund in respect of cultural workers*, OJ C 2, 4.1.85, at 2, the Resolution *concerning the annual event 'European City of Culture'*, OJ C 153, 22.6.85, p.2, the Resolution *on events including European audio-visual productions in third-countries*, Ibid., the Resolution *on special conditions of admission for young people to museums and cultural events*, OJ C 348, 31.12.1985, at 2,

division of competences[50].

This not systematic method – aiming at tackling cultural phenomena without a proper codification of Community's action and without providing a clarification on the division of competences between Community and Member States – was followed also after the *Second Adonnino Report for a People's Europe*[51], presented in 1985 by a Committee set up by the European Council meeting in Fontainebleau in June 1984 in order to "respond to the expectations of the people's of Europe by adopting measures to strengthen and promote its identity and image"[52]. Surprisingly, in the new resolutions later adopted by the Ministers for Cultural Affairs following this report, the concept of identity was scarcely ever recalled[53], while once more an attempt to reassure about the limited scope of Community's action in the cultural field was made[54] and that idea of 'Community heritage' developed in the 1983 Communication started giving the impression of leaving room for an *European* cultural heritage, where the adjective 'European' came across as being more related to the geographical location of specific works of art than to a common heritage. Moreover, it appears worth pointing out that, even when the need to foster the latter looked prominent – for example when addressing the issue of translating books – the relevance of the free movement of goods seemed to gain the upper hand[55], once again showing the close and unavoidable connection between common market and cultural products.

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[50] As underlined by FORREST, A., *La Dimension Culturelle de la Communauté Européenne*, in *Revue du Marché Commun*, 1987, issue 307, at 327, this "mixed formula", combining national Ministers responsible for cultural affairs and Council, proved to be extremely useful in specific sectors – showing both economic and purely cultural characteristics - in which certain Member States tended to deny Community's competence (one example is – according to the Author – the Danish government, according to which only cultural issues with a strong economic content and a specific basis in another article of the Treaty could be addressed). On the ambiguities of this model see in general DEWOST, J.L., *Décisions des institutions en vue du développement des compétences et des instruments juridiques*, in BIEBER, R., RESS., G. (eds), *The dynamics of EC-law*, Baden Baden, Nomos, 1987, 261-281, at 327 ff., while with specific regard to cultural policies see DE WITTE, B., *The Scope of Community Powers in Education and Culture in the Light of Subsequent Practice*, *ibid.*, 261-281, at 272 ff., BROSSAT, C., *La Culture européenne: definitions et enjeux*, Brussels, Bruylant, 1999, at 147.

[51] Bull. EC (1985), Supplement 7/85, at 18.

[52] *Ibid.*, at 5.

[53] A reference to this concept was made in the resolution *on the European cinema and television year*, OJ C 320, 13.12.1986, at 2, and in the Resolution *on the establishment of transnational cultural itineraries*, OJ C 44, 26.2.1986, p.2, where, amongst the reasons for the establishment of these itineraries, besides the possibility to increase the "European awareness", we can interestingly find the potential "increase in tourism and hence a stimulus to the economic development of the regions concerned" to be obtained through them.

[54] Resolution *on the protection of Europe's architectural heritage*, OJ C 320, 13.12.1986, at 1.

[55] The allusion here is to the Resolution on the promotion of translation of important works of European culture, OJ C 309, 19.1.1987, at 3, where the Ministers highlight that "the promotion of translation contributes to the removal of obstacles to the free movement of books and the improvement of conditions of employment of translators, within the terms of the treaty establishing the European Economic Community".

The contents of the 1987 *Single European Act*[56], which sought to review the Treaties of Rome in order to make a step forward towards greater European integration, confirmed this cautiousness: indeed, in spite of the attempt made by the Dooge Committee - an Intergovernmental Committee on the institutional reform of the European Communities set up after the aforementioned European Council of Fontainebleau – which stressed the link between culture and European identity[57], the latter was soon dismissed and no Treaty amendment with regard to this sector was introduced, while attention was paid to the creation of the internal market and to the introduction of policies areas different from the cultural one (for example with regard to environment, social policy, economic and social cohesion).

In the same year, maybe on the wave of these new policies' launch, the Commission, through a new communication[58], highlighted how cultural activity represented "a political as well as a social and economic necessity", and that "given the twin goals of completing the internal market by 1992 and progressing from a People's Europe to European Union", in this way counterbalancing the more economic-oriented approach followed in the SEA. However, the Commission did not ignore the inevitable connection between the free circulation of cultural products, services and workers and the creation of the common market, but at the same time it seemed to vest the latter with a new nature, coexisting with the economic one, by affirming that "the creation of a large market establishes a European area based on common cultural roots as well as social and economic realities"[59] and introducing the idea of 'European cultural area'. More generally, apart from the specific measures suggested by the Commission in establishing a framework program for 1988-1992[60], it also seems important to underline that this communication, unlike the 1977 and 1982 ones, explicitly recalled the concept of identity, defined as a "shared pluralistic humanism based on democracy, justice and freedom", to clarify then that identity itself represents the "basis for European Union, which has goals other than economic and social integration"[61]: in this way, the Commission once more presented cultural activities as something worth undertaking regardless of their economic implications, a perspective also shared by the European Parliament in responding to this communication[62].

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56 OJ L 169, 29.6.1987, at 1.

57 Ad hoc Committee for Institutional Affairs, Report to the European Council, Brussels, 29-30 March 1985, at 20.

58 European Commission, Communication *A fresh boost for culture in the European Community*, Bull. EC (1987), Supplement 4/87.

59 *Ibid.*, at 7.

60 More specifically, this framework included five different areas of action, namely the creation of a European cultural area, the promotion of the European audiovisual industry, the access to cultural resource, the training for the cultural sector and the dialogue with the rest of the world.

61 Foreword to the communication, at 5.

62 European Parliament, resolution on a fresh boost for Community action in the cultural sector, OJ C 69, 20.3.1989, at 180. In particular, the Parliament affirmed that "the single market will not

On that same occasion, the Parliament also explicitly affirmed the need to include cultural measures within the Community's field of competence, in order to guarantee "the preservation of the Community's institutional balance and the guarantees it entails"[63]: this urge was also perceived by the European Council, which, at the end of the meeting held in Rome in December 1990, listed the safeguard of European heritage's diversity and the promotion of cultural exchanges and education among the fields more in need of an extension or a redefinition of Community's competence[64]. This position of the Council then constituted the basis for an Intergovernmental Conference on Political Union, to be held not long afterwards, together with the formal opinion given by the Commission: more specifically, the latter affirmed that it would have been a "good idea" to "include an article on the cultural dimension of Community activities"[65] – so making a further step in comparison with the Council – always given that, however, the Member States' and Regions' competence with regard to cultural affairs would have remained undisputed, and that in coherence with the principle of subsidiarity, which was explicitly recalled. This perspective was also shared by the Parliaments of the European Community, which, in a Declaration adopted in November 1990[66], affirmed the necessity of inserting in the Treaty a separate article on cultural policy, "stipulating that the cultural diversity and wealth of the Community nations must be respected and protected, particularly with regard to language"[67]; at the same time, the Parliaments also showed a more cautious approach, once more recalling the need always to respect the subsidiarity principle.

The idea of expanding Community's competence to include culture was also shared by certain Member States' governments[68], although some doubts soon started to emerge about the concrete extent of the expansion itself – even among the same States suggesting it – also in the light of the tension between supranational

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ensure due progress towards European Union, as advocated by the Single Act, nor prevent distortions, unless it forms part of an area enjoying social cohesion, in which initiative, research, education, vocational training, creativity, the arts, the revitalization and restoration of our heritage and the culture industries are also seen as tokens of progress in the building of Europe, marching side-by-side with it and even paving the way for it" (at 183).

63 *Ibid.*

64 Conclusions of the European Council meeting held in Rome on 14–15 December 1990, 12 Bull. EC (1990), p.8.

65 European Commission, Formal Opinion of 21 October 1990 pursuant to Article 236 of the EEC Treaty on the proposal for an amendment of the Treaty establishing the European Economic Community with a view to a political union, Bull. EC (1991), Supplement 2/91, at 81.

66 Conference of Parliaments of the European Community, Final Declaration adopted on 30 November 1990, reprinted in CORBETT, R., *The Treaty of Maastricht from Conception to Ratification: a Comprehensive Reference Guide*, London, Longman, 1993, at 198.

67 *Ibid.*, at 199.

68 More specifically by the French, the Dutch, the German and the Danish ones, as recalled by CORBETT, R., *supra*, at 51.

and national level and the consequent need to protect cultural diversity[69]. This cautiousness had clear repercussions on the 1991 Luxemburg Presidency *Draft Treaty on the Union*[70]: the latter, drawing upon the proceedings of the Intergovernmental conference, in its title XIX removed references to the concepts of 'European identity' and 'European cultural dimension', both present in a previous draft of an article on Community's action in the cultural field[71], replacing them with a more general 'common cultural heritage' and explicitly clarifying that European institutions' contribution towards the "flowering of the cultures of each Member State" would respect regional and national diversities. This provision, combining a Community competence in the cultural field and a reasserted need to abide by these

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[69] For example - as also recalled by CUNNINGHAM, C.B., *In Defense of Member State Culture: The Unrealized Potential of Article 151(4) of the EC Treaty and the Consequences for EC Cultural Policy*, in *Cornell International Law Journal*, 2001, vol. 34 - the Dutch government, in the *Dutch Government 1st Memorandum, May 1990*, reprinted in CORBETT, *supra*, at 133, affirmed, in addressing the new Community policy areas, that "where cultural policy is concerned, an independent Community policy would not appear to be justified, since priority in this field must be given to the objective of pluralism".

[70] Luxemburg Presidency Draft Treaty on the Union, 19 June 1991, reprinted in CORBETT, *supra*, at 293.

[71] Luxemburg Presidency Non-paper, Draft Treaty articles with a view to achieving political union, 12 April 1991, reprinted in CORBETT, *supra*, at 267. More specifically, title XVI read as follows:

1. The Community shall contribute to the flowering of the cultures of each Member State, at the same time bringing European identity and the European cultural dimension to the fore.
2. Action by the Community, which shall respect the diversity of cultures in Europe, shall encourage cooperation between Member States and, if necessary, support and supplement their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples;
- conservation and safeguarding of the cultural heritage;
- cultural exchanges;
- artistic and literary creation;
- training in the cultural field;
- development of the European audio-visual sector.

3. The Community and the Member States shall foster cooperation with third countries and the appropriate international organizations in the sphere of culture.

4. The Council, acting on a proposal from the Commission [role of the European Parliament], shall adopt measures to contribute to the attainment of the objectives referred to in this article.

diversities[72], represents the ancestor of the current Art. 167 TFEU[73].

1.2 The factual incorporation of cultural considerations in Community law, between positive and negative integration

Even before the introduction of an article specifically devoted to the Community's role with regard to the cultural sector, some references to culture were already present in the Treaty of Rome, more specifically in Art. 131 EEC (now Art. 198 TFEU), referring to the role of the Community in assisting associated third countries' cultural development, and in Art. 36 (now Art. 36 TFEU)[74]. The latter, in the light of certain cultural goods' specificities and drawing upon Art. XX of the General Agreement on Tariffs and Trade[75] (GATT), introduced a derogation to the general prohibition of quantitative restrictions between Member States: in particular, it listed "the protection of national treasures of artistic, historical or archaeological

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72 The need to respect national and regional diversities was highlighted also by the Commission in its draft of an article on culture and protection of the heritage, contained in the *Contributions by the Commission to the Intergovernmental Conference*, Bull. EC (1991), Supplement 2/91, p.147. As underlined in the explanatory memorandum attached to the draft, "the Treaty does not set out to introduce a common cultural policy and certainly does not aim at the kind of centralization that can only result in uniformity. The Union is conceived as having a purely supporting role, with powers over cultural matters remaining firmly with the Member States and their regional authorities. All the Union would do would be to make its contribution where this seems potentially useful". However, the Commission's was also rather innovative: indeed, what emerges from the provision conceived by it - besides the relevance of dissemination, the cooperation with international organization, and other aspects already tackled by the Luxemburg Presidency draft - is the need to take the cultural dimension into account also when dealing with policies other than the cultural one ("In pursuance of the objectives set out in paragraph I, the Union shall have regard for the cultural dimension in its other policies", *ibid.*): this provision, as also pointed out in the aforementioned explanatory memorandum, "involves the institutions in making appropriate adaptations to general rules if they have a potential impact on cultural goods and services".

73 More in general, the whole draft developed by the Luxemburg presidency, proposing the establishment of three pillars for the Union, constituted the basis for the negotiations that led to the 1992 Treaty of Maastricht which, as anticipated, formally vested the Community with a competence with regard to cultural affairs.

74 FERRI, D., *La Costituzione culturale dell'Unione europea*, Padova, Cedam, 2008, also recalls other provisions indirectly instrumental to the Community's forays in the cultural sector, as Art. 39 EEC, par. 2, lett. a), affirming the need to take into account the social structure of agriculture when working out the common agricultural policy, or all the Treaty's provisions related to fundamental rights (such as the freedom of establishment).

75 This Article, entitled 'General exceptions', at (f) enables the contracting parties to adopt or enforce measures "imposed for the protection of national treasures of artistic, historic or archaeological value", always "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". On the interpretation of Art. XX(f) see GAGLIANI, G., *Interpreting and Applying Article XX(f) of the GATT 1994: "National Treasures" in International Trade Law*, in *Santander Art and Culture Law Review*, 2019, 2, 35-56.

value" among the grounds for limiting the applicability of the rules established by Artt. 30-34 EEC, ensuring the free movement of goods. At any rate, as also explicitly recalled by the European Commission in 1989[76], the exception provided by Art. 36 had to be subject to a strict interpretation – the latter being somehow also hinted at by the very specific notion of 'national treasures', making no reference to the broader concept of culture – and, in addition to that, following the same logic, all the restrictions on importation, exportation or transit introduced by Member States for cultural heritage-related reasons or different ones – always strictly defined by art. 36 itself[77] – could not embody "either a means of arbitrary discrimination or a disguised restriction on trade"[78].

However, the scarcity of cultural-related provisions in the treaties, clearly not aiming at strengthening Community's role in this sector but at the same time – as emerging from Art. 36 – indirectly acknowledging the specificities of certain cultural products, did not prevent it from adopting, as already seen, concrete measures to support and promote the cultural sector, showing the existence a cultural policy independent from the achievement of market goals[79] and expression of the so-called positive integration[80]. More specifically, the Community, making use of its powers of functional nature[81], namely the ones not formally conferred to it but justified on

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[76] European Commission, Communication on the protection of national treasures with an artistic, historic or archaeological value: Needs arising from the abolition of frontiers in 1992, COM (89)594 final. In addition to the need for a strict interpretation, this Communication also remarkably underlines that "'It is for each Member State to determine its own criteria for identifying cultural objects that can be regarded as "national treasures"; nevertheless, the concept of "national treasures possessing artistic, historic or archaeological value" cannot be defined unilaterally by the Member States without verification by the Community institutions".
The same restrictive approach was also followed by the European Court of Justice in the 1968 famous case Commission v. Italy – which will be analysed hereinafter – where the idea of a general cultural exemption was rejected.
[77] More specifically, Art. 36 also mentions grounds of public morality, public order, public safety, the protection of human or animal life or health, the preservation of plant life and the protection of industrial and commercial property.
[78] *Ibid.*
[79] CUNNINGHAM, C.B, cit., at. 130.
[80] As underlined by PINDER, J., *Positive Integration and Negative Integration: Some Problems of Economic Union in the EEC*, in *The World Today*, 1968, vol. 24, issue 3, 88-110, at 90, the negative kind of integration implies "the removal of discrimination", while the positive one stands for "the formation and application of coordinated common policies in order to fulfil economic and welfare objectives rather than the removal of discrimination".
On the distinction between positive and negative integration in the cultural sector see DE WITTE, B., *Cultural Policy; The Complementarity of Negative and Positive Integration*, in SCHWARZE, J., SCHERMERS, H.G., (eds), *Structure and Dimensions of European Community Policy*, Baden Baden, Nomos, 1988, 195-204, LOMAN, A., MORTELMANS, K., POST, H., WATSON, S., *Culture and Community Law Before and After Maastricht*, Alphen aan den Rijn, Kluver Law International, 1992, at 14-19.
[81] The spillover mechanism, according to which integration in one field sets the conditions for integration in another policy field, represent a pillar of the neo-functionalist theory. For a complete statement of it see HAAS, E., *Beyond the Nation-State. Functionalism and International Organization*, Colchester, ECPR Press, 1964. For an analysis of the so-called 'competence creep', which leads European institutions to legislate or to otherwise act in fields where no specific competence has

the basis of an objective to attain (which might be the one related to creation of the common market), adopted a handful of measures with a clear cultural impact, progressively adapting Community's law to the cultural sector[82] – which however remained quite peripheral[83] – also on the basis of the well-known Casagrande ruling, in which the CJEU expressed its refusal to screen any policy sector from this indirect kind of Community's action[84].

The measures adopted ranged from a regulation on the export of cultural goods[85], aimed at ensuring their protection and complemented by a directive on their return once unlawfully removed from a Member State's territory[86], to special rules on the privileged tax treatment of specific cultural goods and services[87], including also a directive aiming at promoting cross-border broadcasting, the so-called 'Television Without Frontiers' (TWF) directive[88], which still represents – albeit reformed and known as 'Audio-Visual Media Service' directive – the cornerstone of European audio-visual policy.

Some cautiousness in touching upon cultural affairs emerges from the scope of application of both the regulation and the directive dealing with export and return

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been conferred to it see WEATHERILL, S., *Competence Creep and Competence Control*, in *Yearbook of European Law*, vol. 23, issue 1, 1-55.

On the choice to define EU powers on the basis of purposes to be attained and the related consequences in terms of social legitimacy of the EU see DAVIES, G., *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *European Law Journal*, 2015, vol. 21, issue 1, 2-22.

On the use of functional powers in the cultural sector see also DE WITTE, B., *The Scope of Community Powers in Education and Culture in the Light of Subsequent Practice*, cit., LOMAN, A., MORTELMANS, K., POST, H., WATSON, S., cit., at 12.

82 "Adaptation du droit communautaire au secteur culturel" is an expression used by CORNU, M., DE LAMBERTERIE, I, *Les politiques culturelles dans l'Europe Communautaire: l'évolution du cadre juridique*, in *Études internationals*, 1996, vol.27, issue 4, 743-768, at 756.

83 In these terms DE WITTE, B., POST, H.H.G., *Educational and Cultural Rights*, in CASSESE, A., CLAPHAM, A., WEILER, J. (eds), *Human Rights and the European Community, the Substantive Law*, Baden Baden, Nomos, 1991, at 138-141.

84 Case 9/74, *Donato Casagrande v. Landeshauptstadt München* [1974], ECLI:EU:C:1974:74. More specifically, according to the judges "'although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community Institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training".

85 Council Regulation (EEC) No. 3911/92/EEC of 9 December 1992 on the export of cultural goods, OJ L 395, 31.12.1992, at 1.

86 Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, OJ L 74, 27.3.1993, at 74.

87 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes—Common system of value added tax: uniform basis of assessment, OJ L 145, 13.6.1977, at 1, and Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates), OJ L 316, 31.10.1992, at 1.

88 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, at 23.

of cultural objects: indeed, providing very specific conditions for objects to be subject to their regimes[89], they imply a very restrictive definition of cultural goods, without taking into account the "evolutionary character of culture"[90], therefore neglecting the specificities of cultural products.

In more general terms, the indisputable cultural impact of these actions notwithstanding, the prevailing economic dimension of them clearly emerges from both their legal bases[91] – which is not surprising, given the lack on a provision specifically devoted to culture – and their objectives, to a various extent always related to the completion of the internal market. This is particularly clear in the TWF directive which, drawing inspiration from the Community's free-market orientation, is directed at ensuring the free movement of television programmes across European borders: this measure, although following the example of the European Convention on Transfrontier Television developed by the Council of Europe[92], greatly differs from the latter – which on the contrary in its preamble recalled "the importance of broadcasting for the development of culture"[93] – being on the contrary focused on the establishment of the common market, and more specifically on the need to ensure the free movement of services, in this case of the television broadcasting one[94].

The same tendency of the economic dimension to prevail over the cultural one is noticeable also in two initiatives launched in the 1980s, namely the MEDIA[95] programme – aiming at promoting the development of the European audio-visual industry – and the LINGUA[96] one, encouraging an improvement in foreign language teaching and learning in Members States. Indeed, the first was considered instrumental to the creation of the conditions which would have then enabled the

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89 More specifically, in order to be subject to the regulation regime, an object had to fall within one of the categories listed in its Annex, while, in the case of the directive, the object had be included in the list provided for by its Annex or in the one provided by Art. 1 of the directive itself, and it also had to be classified as a 'national treasure' under Art. 36 EEC Treaty. These strict conditions confirm the tendency to allow limitations to the free movement principles only in exceptional cases.

90 In these terms see STAMATOUDI, I., *The National Treasures Exception in Article 36 of the EC Treaty: How Many of Them Fit the Bill?* In *Art Antiquity and Law*, 1998, vol. 3, issue 1, 39-52, at 43.

91 Art. 113 EEC for regulation 3911/92, Art. 100a EEC for directive 93/7, Artt. 99 and 100 for directive 77/388, Art. 99 EEC for directive 92/77, Art. 99 EEC for directive 92/77.

92 Council of Europe, European Convention of Transfrontier Television of 5 May 1989 (ETS no. 132).

93 The difference between the directive and the Convention is also recalled by KATSIREA, I., *The Television Without Frontiers Directive,* in DONDERS, K., PAUWELS, C., LOISEN, J., *The Palgrave Handbook of European Media Policy*, London, Palgrave Macmillan, 2014, 297-309 at 297.

94 "Whereas the Treaty provides for the establishment of a common market, including the abolition, as between Member States, of obstacles to freedom of movement for services and the institution of a system ensuring that competition in the common market is not distorted" (directive 89/552/EEC, at 24).

95 Council Decision 89/489/EEC of 29 July 1989 establishing an action programme to promote foreign language competence in the European Community, OJ L 239, 16.8.89, at 24.

96 Council Decision 90/685/EEC concerning the implementation of an action programme to promote the development of the European audiovisual industry, OJ L 380, 31.12.1990, at. 37.

undertakings to fully benefit from the single market dimension, while in the second initiative the improved knowledge of foreign languages was considered essential to overcome linguistic differences hindering the free movement of persons, goods, services and capital.

1.3 Cultural considerations in the CJEU's jurisprudence: the complementary negative integration

The TWF directive, by providing both the introduction of quotas reserved to European audio-visual works[97] and the removal of barriers to the free movement of services, gives a hint of the complementarity between positive and negative integration, namely the application of the market integration principle to the cultural sector, which alone might have appeared as a phenomenon threatening cultural identity if not accompanied by the aforementioned measures of positive integration[98] (on the other hand, the scope of the latter, given the lack of a cultural provision in the Treaties might have been insufficient to cope with the cultural phenomenon).

The general prohibition of measures restrictive of free movement at the basis of the negative integration notwithstanding, it is worth recalling that, however, the European Court of Justice has over the years justified some of these measures in the light of the need to take into account non-economic interests, even not included in the Treaties, such as the cultural ones[99].

However, the attempt to consider these not-economic interests was still embedded into a general tendency shown by the Court not to consider the cultural sector exempt from the EEC economic provisions on free movement and competition. More specifically, with regard to free movement, this trend, already started in the aforementioned ruling Commission v. Italy[100] – in which the Court underlined the need to strictly interpret Art. 36 EEC and refused a general differentiation between trade commodities and cultural goods by considering applicable to the latter the prohibition of quantitative restrictions – was reaffirmed in other rulings showing the Court's concerns for the integrity of the market[101]: at

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[97] See Artt. 4 and 5 of the Directive.

[98] The potential damage to national cultural identities was underlined by BEKEMANS, L., *European Integration and Cultural Policies. Analysis of a Dialectic Polarity*, 1990, in *EUI Working Papers* ECS No. 90/1. The Author here recalls the fact that in 1985 a Community aid scheme for non-documentary cinema and television co-production proposed by the Commission was not adopted by the Council because of Denmark's perplexities about the Community's legal competence to act in the cultural field: for this reason, the more modest MEDIA programme was adopted instead.

[99] For a detailed and comprehensive analysis see LOMAN, A., MORTELMANS, K., POST, H., WATSON, S., cit.

[100] Case 7/68, *Commission of the European Communities v. Italian Republic* [1968], ECLI:EU:C:2003:656.

[101] See for example Case 8/74, *Procureur du Roi v. Dassonville* [1974], ECLI:EU:C:1974:82, where a broad interpretation of the concept of "measures having equivalent effect to quantitative

the same time, in spite of this tendency to consider unlawful all the measures potentially hindering the free movement adopted by Member States, the Court at times also acknowledged the peculiarity of cultural goods. Indeed, especially after the *Cassis de Dijon* ruling[102], the European judges started to accept national regulations restricting the free movement across Member States which could be justified by the so-called "rule of reason", enabling the States to restrict the export of cultural goods if needed to safeguard general interests[103] falling within the category of so-called 'mandatory requirements'[104]: thus, on the basis of the rule of reason – a very general and open definition capable of comprehending also non-economic interests such as the ones related to culture – the CJEU began to accommodate cultural considerations in its case-law and, by further developing this doctrine, declared its support for national measures restricting intra-Community trade but pursuing public policy goals, if necessary, appropriate and proportionate to the aim pursued[105]. However, a distinction in the treatment of cultural-protectionist measures and both economic- and cultural-protectionist ones can be at times detected[106], showing some kind of recalcitrance to admit a general cultural

restriction" was provided (All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions", *Ibid.* at 852), therefore leading to an expansion of the scope of Art. 30 EEC and to an increase in the number of cases brought before the Court.

[102] Case 120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein* [1979], ECLI:EU:C:1979:42.

[103] Potential justifications can be for example found in the need to promote the national language (Case 379/87, *Groener v. Minister for Education and the City of Dublin Vocational Education Committee* [1989], ECLI:EU:C:1989:599), to ensure a wide dissemination of knowledge on the artistic and cultural heritage of a country (Case C-154/89, *Commission v. France* [1991] ECR I-659), to ensure freedom of expression in the audio-visual sector (Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media* [1991] ECLI:EU:C:1991:323). However, the fact that a cultural interest may justify those measures under the CJEU's scrutiny does not imply a favourable outcome of the latter: indeed, in many cases the national measures were considered as restrictive of the freedom of movement, mainly because deemed to be unnecessary or unproportionate.

[104] Among these mandatory requirements, the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer are explicitly mentioned. However, the list provided for by the CJEU is an open ended one: as underlined by CHECHI, A., *Cultural Matters in the Case Law of the European Court of Justice,* in *Art Antiquity and Law*, 2004, vol. 9, issue 3, those mandatory requirements represent a tool through which various non-economic aspects, which acquired increasing relevance during the integration process, are taken into account. Considering them as a *numerus clausus* would then turn to be counterproductive, depriving the rule of reason of its essential and characteristic flexibility.

[105] The rule of reason doctrine was for the first time invoked for cultural interests' protection in Case 229/83, *Association des Centres distributeurs Édouard Leclerc and others v. SARL "Au blé vert" and others* [1985] ECLI:EU:C:1985:1: in that case, the measure adopted by the French government establishing a minimum price for books in order to ensure an adequate level of profitability to national publishers and, in this way, a diversified cultural offer, was considered by the Court as falling outside the scope of the rule of reason doctrine, and that because of a lack of appropriateness and proportionality.

[106] The distinction between *protectionnisme culturel* and *protectionnisme économico-culturel* is made by DURMONT, H., *Les compétences culturelles de la Communauté européenne. Bilan critique et perspectives*, in *Revue*

exception to the EEC economic rules and a tendency to let prevail economic considerations over the cultural ones. Interesting in this sense is the famous *Cinéthèque* case[107], dealing with the applicability of competition law to national rules on release windows[108] and often recalled to show the CJEU's awareness of the specificities of the cultural sector. In the opinion delivered in March 1985, Advocate General Slynn seems to be aware of the fact that the cultural and the economic dimensions are tightly intertwined, affirming that "the support of cultural objectives is essentially dependent on economic factors"[109] to then provide an economic justification for the measure adopted by the French government, by considering both commercially fair and in the general interest a regulation of films' screening meant to preserve and support the audio-visual industry, given that "only in such a way can the 'consumer' be assured of a supply of films"[110].

Nonetheless, it also appears worth highlighting the potential benefits for the cultural sector coming from this economic approach, given the connection between freedom of movement, removal of obstacles to the exchanges between Member States and fostered cultural interactions, giving European citizens the possibility to enjoy a wide range of cultural products: a precise strategy carried out by the Community institutions[111] or a heterogenesis of purposes?

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interdisciplinaire d'études juridiques, 1992, vol. 29, issue 2, 1-47. More specifically, the Author recalls the different approach followed by the Court in the aforementioned ruling *Groener* – where the Court justified the language requirement imposed on the applicant for a permanent full-time post as teacher on the basis of a broader policy for the promotion of the national language – and in the Case 352/85, *Bond van Adverteerders v. The Netherlands State* [1988], ECLI:EU:C:1988:196, where European judges considered a Dutch law prohibiting the distribution of programmes supplied from other Member States and containing advertisements targeting the domestic audience as incompatible with the free circulation of services. In their perspective, this prohibition would have protected the economic position of Dutch public broadcasters, therefore the measure was deemed to be directly discriminatory and having an economic goal not falling within the public policy exception set forth by Art. 56 EEC (while in the Dutch government reconstruction the prohibition had a non-economic aim, being addressed at preserving the non-commercial and pluralistic nature of the broadcasting system in the Netherlands).

[107] Joined cases 60/84 and 61/84, *Cinéthèque SA and others v. Fédération nationale des cinemas français* [1985], ECLI:EU:C:1985:329.

[108] More specifically, Art. 98 of French Law n. 82-652 of 29 July 1982 on audiovisual communication states that: "No cinematographic work being shown in cinemas may simultaneously be exploited in the form of recordings intended for sale or hire for the private use of the public, in particular in the form of video cassettes or video discs, before the expiry of a period to be determined by decree and to run from the date of the issue of the performance certificate. That period shall run from 6 to 18 months. That requirement may be waived subject to conditions to be determined by decree".

[109] Opinion of Advocate General Sir Gordon Slynn delivered on 20 March 1985, Joined cases 60 and 61/84, at 2613.

[110] *Ibid.*

[111] For a cultural justification of the economic approach see MISSIR DI LUSIGNANO, L., *L'action de la Communauté européenne en faveur de la culture*, in DELCOURT, J., PAPINI, R., *Pour une politique européenne de la culture*, Paris, Economica,1987, at 78-80.

2. The introduction of art. 167 TFEU: a formalized Community's (in-?)action

2.1 From the "Competence creep" to an explicit Community's competence: the framework after 1992

As anticipated, the introduction in 1992 of a provision specifically devoted to culture, clarifying the scope of Community's action, was of paramount importance, considering the need to appease the debate on the allocation of competences between Community Institutions and Member States, afraid of an erosion of their cultural powers due to the "hidden" cultural policy carried out at the supranational level[112].

Predictably, also in coherence with the fear of cultural homogenization shown d by Member States during the Intergovernmental Conference on Political Union held in 1990, there was no sudden shift from a lack of conferral of powers to a full-relief competence, replacing domestic ones: on the contrary, if, on the one hand, art. 128 EC (now art. 167 TFEU) – the introduction of which was however hindered by some Member States[113] – explicitly enabled the Community to take steps in the cultural sector, on the other hand it established very strict and precise boundaries within which it could act, representing the product of an exercise of balance between two different and opposed needs, namely the one to safeguard national cultures and the one to more effectively pursue cultural aims at the supranational level.

Mirroring this compromise, what emerges from the first paragraph of this provision – which will be now analysed in its consolidated version – is a limited Union[114]'s competence, restricted to the contribution to the "flowering of cultures of the Member States", to be made while taking into account and respecting the intrinsic national and regional diversities, at the same time "bringing the common cultural heritage to the fore". In more practical terms, as specified by the second paragraph, the aim of the Union shall be encouraging cooperation between Member States, also supporting and supplementing their action in a wide range of sectors related to culture[115], if necessary.

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[112] As recalled by PSYCHOGIOPOULOU, E., cit, this fear was exacerbated by the SEA, prescribing qualified majority decision making and therefore depriving Member States of their veto powers, namely of their possibility to block the legislative process in case of unwanted cultural initiatives launched by the Commission.

[113] CRAUFURD SMITH, R., cit., at 24, recalls the opposition to this provision by the United Kingdom, which did not block its introduction but insisted on drafting it more cautious terms.

[114] As is well known, once the Maastricht Treaty entered into force in 1993 the European Economic Community was renamed 'European Community' and was then embedded into the new European Union, becoming the first of its three pillars (together with foreign and security policy and policy and judicial cooperation in criminal matters): these three pillars were then eliminated when the Treaty of Lisbon entered into force in 2009, so the notion of European Community disappeared: this is the reason behind the reference in the current version of art. 167 TFEU to the Union.

[115] More specifically, art. 167 (2) mentions the improvement of the knowledge and dissemination of the culture and history of the European peoples, the conservation and safeguarding of cultural

The complementarity of Community's action, which was also explicitly recalled by the European Council[116] and which is now confirmed by Art. 6 of the TFEU, listing culture among the sector in which the Union have supporting, coordinating and supplementing competences, led part of the legal doctrine to question the nature of art. 167 as a provision conferring a proper cultural competence to the Union and, on the contrary, to qualify it as a 'negative' instrument, aiming at restraining the latter's action[117]. If, on the one hand, the focus on the need to safeguard cultural diversity – also enshrined in art. 22 of the Charter of Fundamental Rights of the European Union[118] and in art. 3 (3) of the Treaty on the European Union (TUE)[119] – and on the subsidiarity principle – for the first time introduced by the Treaty of Maastricht and now contained in Art. 5 TUE[120] – together with the scarcity of instruments at EU disposal in undertaking a cultural policy – emerging from Art. 167(5), which also excludes any kind of harmonisation[121] – appear to be undisputable, the thesis according to which art. 167 marks the first explicit conferral

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heritage of European significance, non-commercial cultural exchanges, the artistic and literary creation, including in the audiovisual sector.

[116] Conclusions of the Council of 10 November 1994 on the Commission communication concerning European Community action in support of culture, OJ C 348, 9.12.1994, at 1.

[117] For an overview of the debate over the nature of Art. 167 see FERRI, D., cit. The Author also recalls, among others, PEREZ, S., *L'Union Européenne e la création artistique*, in *Annuaire Européen d'administration public 2000*, 2000, 333-358, who significantly underlines that art. 167 "soit fondé non sur le principe d'une véritable attribution de compétences, mais plutôt sur des actions subsidiaires et sur une coopération complétant lesquelles des Etats".

[118] Which reads: "The Union shall respect cultural, religious and linguistic diversity".

[119] "[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

[120] This article states at par. 1 that "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality", to then specify the content of these principles. More specifically, according to the subsidiarity one, unfolded in par. 3, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

[121] Looking at the procedural side, this provision states that, in order to contribute to the achievement of the cultural objectives, "the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States", while "the Council, on a proposal from the Commission, shall adopt recommendations". The tool at the Union's disposal are then incentive measures and recommendations: with regard to the incentive instruments, the ordinary legislative procedure is observed, with the additional requirement to consult the Committee of the Regions (CoR), the involvement of which can be once more considered as an instrument to ensure the safeguard of cultural diversity and avoid homogenisation. at the beginning, the approval of incentive measures required unanimity, but the Treaty of Lisbon then extended qualified majority Council voting to them, in this way making procedures faster and smoother and removing an obstacle, namely unanimity, to the effective implementation of support for the cultural sector (in these terms see BARNETT, C., *Culture, policy and subsidiarity in the European Union: From symbolic identity to the governmentalization of culture*, in *Political Geography*, 2001, vol. 20, n. 4, 405-426, at 412).

of cultural powers to the Union seems preferable[122], and that for a two-folded reason.

First of all, both the aforementioned par. 2 and par. 3 – the latter regarding the cooperation of the EU with third countries and international organisations in the field of culture – of Art. 167 are drafted in extremely broad terms. This might be due to the issues potentially arising from an attempt to define what can be included within the concept of culture and what cannot, nevertheless they end up enabling the European Union to adopt a wide range of actions in the cultural field making use of its explicit powers, both at the internal (Art. 167, par.2) and at the external (Art. 167, par.3) level: that would not seem coherent with a reconstruction of Art.167 as establishing a EU negative competence, since probably, in that case, the areas in which the latter is allowed would have been defined in stricter terms, and that in order to properly set the boundaries of EU action. Moreover, for the same reason the legislator would have specified that the activities listed in par. 2 are to be read as exhaustive, while on the contrary the list provided by Art. 167(2) has to be interpreted as an open-ended one[123].

The second reason is related to the implicit EU power which can be found at Art. 167(4): according to this provision, "the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and promote the diversity of its cultures". Apart from the reference to cultural diversity, coherent with the overall scheme of Art. 167 and introduced in 1997 by the Amsterdam Treaty, the innovativeness of this provision lies in the fact that it makes cultural diversity itself a cross-cutting horizontal concern which shall steer EU action in policy domains other than the cultural one. This paragraph – more than the basis for positive measures to be adopted – can be certainly considered as a way to guide and restrain EU action so that cultural diversity is respected but, in order to better reconstruct the aim of the European legislator, it also appears worth analysing the framework in which this provision was embedded when it was introduced, especially considering three provisions laying down three different kinds of cultural derogation. In particular, reference here has to be made to the aforementioned Art. 30 TEC (now Art. 36 TFEU), to Art. 87(3)(d) TEC (now Art. 107(3)(d) TFEU), providing a derogatory discipline for state aids to

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[122] See for example GARBEN, S., *Supporting Policies*, in KUIJPER, P. J. *et al.* (eds), *The Law of the European Union*, Alphen aan den Rijn, Wolters Kluver, 2018, 1199- 1229, who affirms that, through Art. 167, the Maastricht Treaty inserted an "explicit competence" in the cultural field, even though, in the Author's perspective, the innovative scope of this provision is not to be overestimated, being on the contrary to consider as "legitimizing existing practice and attempting to draw sharper boundaries for future initiatives" (at 1221).

[123] See for example WOODS, L., *Culture and the European Union*, in VAN EMPEL, M, (eds), *From Paris to Nice: Fifty Years of Integration in Europe*, Alphen aan den Rijn, Kluwer Law International, 2003, 109-129, at 110.

culture[124], and to Art. 133 TEC (now Art. 207 TFEU), establishing a special discipline for agreements relating to trade in cultural and audio-visual services[125]: interpreting Art. 167 as merely restraining EU action would, to some extent, lead to consider this paragraph as a residual provision, integrating the exceptions explicitly introduced by those three articles[126], while, on the contrary, it might seem more coherent with the overall *ratio* of the article to consider the cultural mainstreaming clause as a source of implicit powers meant to effectively complement the explicit ones, conferred to the Union by the first two paragraphs of the same provision.

Moreover, it is also worth underlining the 'positive' wording of Art. 167(4), emerging from the reference to the Union's duty to respect but also to *promote* the diversity of its cultures and therefore implying something more than specific derogations for the cultural sector – nonetheless necessary to acknowledge its characteristics –, being both the respect and the promotion targeted at fulfilling the duty to "take cultural aspects into account", meaning that the cultural dimension has to underpin EU action as a whole, possibly also playing a propulsive role in raising awareness on specific issues which would otherwise be overlooked[127]: the fact that those cultural aspects largely remain within the jurisdiction of the Member States – entitled to determine their own cultural objectives and policies – does not entail a limitation of Art.167(4), on the contrary making the mainstreaming clause even more

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124 "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. […] The following may be considered to be compatible with the common market: […] aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest".

125 More specifically, according to this provision, "the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States". In the new Art. 207 the requirement of agreements jointly concluded by the Community is replaced by the unanimity requirement in the Council, that shall act unanimously "for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity".

126 Similarly, FERRI, D., cit., at 82, notes that not accepting the implicit powers conferred to the Union by Art.167(4) would lead to consider it as a provision merely acknowledging the above-mentioned cultural exceptions ("A meno di non volerla considerare meramente ricognitiva dell'eccezione culturale di cui agli artt. 30, 87 e 133 TCE, la clausola sembra attribuire alla Comunità veri e propri implicit powers").

127 This also emerges at times from a brief overview of the CJEU's jurisprudence. For example, in the opinion given by Advocate General Trstenjak delivered on 29 June 2011 Case C-135/10, *SCF Consorzio Fonografici v. Marco del Corso* [2012] ECLI:EU:C:2012:140, in which Art. 167(4) is recalled not to justify a cultural derogation but to stress the need to ensure adequate protection to copyrighted works.

relevant[128], always given the need to properly implement it[129], ensuring an appropriate assessment of the impact on culture of European policies[130] and, also, promoting synergies between the cultural sector and other actions carried out by the Union[131]. These synergies may also appear capable of soothing the tensions between cultural concerns and internal market ones, as also shown by the recent Commission's proposal for a European Media Freedom Act (EMFA)[132], providing new rules to safeguard media pluralism and independence within the EU. The EMFA, based solely on Art. 114 TFEU – the latter providing for the adoption of measures aiming at approximating Member States' provisions having as object the establishment and the functioning of the internal market –, solves the potential tensions between this act and Art. 167 – insisting on Member States' competence in the cultural field – by connecting their objectives. Indeed, as affirmed in Recital 2, the protection of media freedom and pluralism appears to be "an essential feature

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[128] In these terms Commission of the European Communities, *1st Report on the consideration of cultural aspects in European Community action*, COM(96) 160 final, 17.4.1996, at 2. In the same document, the Commission also stressed the "compulsory and systematic" nature of the need to take cultural considerations into account, without, however, establishing procedures for this to happen.

[129] In a note requested by the European Parliament's Committee on Culture and education, FISHER, D., *Briefing paper on the implementation of Art. 151.4 of the EC Treaty in the context of the Commission study*, Brussels, European Parliament – Directorate for Structural and Cohesion Plicies, 2007, especially recalls the need to ensure coordination between Commission Directorates, also making reference to the notion of a Creative Task Force, capable of providing "a platform as well as a higher profile for the consolidation of cultural and creative sector interests providing it does not add to the bureaucracy".

[130] This need for a cultural assessment was also underlined by the European Parliament in its *Resolution on the first report of the Commission on the consideration of cultural aspects in European Community action*, OJ C 055, 24.2.1997, where the Commission was called on "to develop appropriate procedures for assessing, when embarking on drawing up policies under other provisions of the Treaty, what proposals are likely to have an impact on culture and to identify these in its annual work programme". At the same time, it is also worth noticing that the Parliament, in the same resolution, seems to somehow reduce the scope of Art. 167(4), by affirming that "the taking into account of cultural aspects will in future be a requirement imposed on the European Community and that compliance with this requirement involves the establishment of a clause whereby all Community acts and actions which may have a cultural impact must be compatible with cultural objectives", therefore considering this provision not as a duty but as an option needing further reinforcing to be effective.

While a provision of this kind is still lacking, reference to a cultural impact assessment implementing Art. 167(4) can be for example found in EU's Environmental Impact Assessment Directive 2014/52/EU, requiring an evaluation of projects' impact on cultural heritage.

[131] The need for synergies was strongly underlined by the Council of the European Union in many resolutions, such as the Council Resolution of 26 May 2003 on the horizontal aspects of culture: increasing synergies with other sectors and Community actions and exchanging good practices in relation to the social and economic dimension of culture, OJ C 136, 11.6.2003, or the Resolution of 20 January 1997 on the integration of cultural aspects into Community action, OJ C 36, 5.2.1997, where the Commission was asked to "report annually to the Council on how cultural aspects have been taken into account in the Community's actions under other provisions of the Treaty".

[132] Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market and amending Directive 2010/13/EU, COM(2022) 457 final.

of a well-functioning internal market for media services"[133]: in this way, the Commission considers elements belonging to the cultural dimension as functional to the appropriate provision of services (this time in their economic dimension), underlining their complementarity.

2.2 The effects of Art. 167 on the CJEU's jurisprudence

The observance of Art. 167 – as stated by Art. 19 TEU[134] – shall be ensured by the Court of Justice of the European Union: however, the introduction of a proper cultural basis for Community's action in the cultural field did not lead – at least at the beginning – to a radical change in its case-law, which on the contrary at times showed some kind of reluctance to take into account plain cultural considerations.

If, on the one hand, already in 1993 relevance was placed upon Art. 167 (at that time Art. 128), for example in the opinion given by Advocate General Van Gerven in the *Fedicine*[135] case, where this provision was explicitly recalled and the need to apply the national treasures exception – conceived for the movement of goods – also to national measures concerning the provision of services was underlined[136], on the other hand some kind of recalcitrance can be for example detected in the well-known *Bosman* case[137]. Here the judges, in examining the compatibility of the rules on football players' transfer fees – according to which a professional footballer national of one Member State could not be transferred, on the expiry of the contract with a club, to a club of another Member State, unless a fee was paid – and of the so-called "nationality clauses" – enabling national football clubs to limit the number of foreign players fielded during matches – with Art. 48 of the EEC Treaty (now Art. 45 TFEU) on workers' freedom of movement, refused the cultural argument,

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133 This connection between cultural and internal market goals is also underlined by ETTELDORF, C., *Why the Words "But" and "However" Determine the EMFA's Legal Basis*, in VerfBlog, 13.6.2023, https://verfassungsblog.de/why-the-words-but-and-however-determine-the-emfas-legal-basis/. More specifically, the Author focuses on the fact that "elements that are actually of a cultural dimension are made a prerequisite for the appropriate provision of services in their economic dimension", also in coherence with the European Charter of Human Rights, stressing the interrelation between pluralism and freedom on the one hand, democracy on the other.

134 Art. 19 TEU, at par. 1, reads as follow: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed".

135 Case C-17/92, *Federación de Distribuidores Cinematográficos v. Estado Español and Unión de Productores de Cine y Televisión* [1993], ECLI:EU:C:1993:74.

136 However, the analogous application of Art. 36 notwithstanding, the contested measure adopted by the Spanish Government, making the distribution in Spain of films from third countries, dubbed into one of the official national languages, subject to a system of licenses imposing on the distributor an obligation to distribute also a Spanish film, was considered as pursuing a purely economic aim and therefore not justifiable by the overriding reason of protection of the national cultural heritage.

137 Case C-415/93, *Union royale belge des sociétés de football association and Others v. Bosman and Others* [1995], ECLI:EU:C:1995:463.

brought forward by Germany. In particular, the latter argued for the existence of some similarities between culture and sport – not to be considered, in most cases, as an economic activity – and recalled the Community's duty, enshrined in Art. 128(1) of the EC Treaty, to respect the national and regional diversity of the cultures of the Member States: this reasoning was very briefly dismissed by the Court, which merely focused on the centrality of Art. 48 in Community's legal framework and did not further elaborate on the possibility to use Art. 128 as a way of limiting the scope of it. On the contrary, this provision was solely considered as an example of Community's "powers of limited extent", and its potential in shaping derogations to provisions such as Art. 48 was not tackled, although the issue of the exceptions to it was central also in the opinion given by the Advocate General[138].

A similar approach was also followed in *Commission v. Belgium*, where the Court limited the scope of Art. 167 with regard to broadcasting activities[139], in *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione* Lazio, a ruling which might be considered as an attempt made by the CJEU to limit Community's competence in the cultural field[140], and, up to a certain extent, in *European Parliament v. Council of the European Union*, regarding the multiannual programme to promote the linguistic diversity of the Community in the information society (MLIS)[141]. Here the Court significantly presented its perspective on the possibility to ground measures having cultural repercussions on Art. 167: after having specified that the legal basis cannot be determined through the wording of the title, the Court focused on the need to distinguish the industrial and the cultural goals of a specific measure, excluding the possibility to ground it on Art. 167 when the cultural effects appear to be merely indirect and incidental, if compared with the direct (industrial) effect

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[138] Opinion of Advocate General Lenz delivered on 20 September 1995, Case C-415/93. More specifically, in referring to two analogue judgements, the AG affirmed that "It is plain, however, that in those judgments the Court expressed the view that rules which prescribe that only players who possess the nationality of a State can play in that country's national team are consistent with Community law. That conclusion appears obvious and convincing, but is not easy to state the reasons for it".

[139] Case C-11/95, *Commission of the European Communities v. Kingdom of Belgium* [1996], ECLI:EU:C:1996:316. Here, in particular, Belgium used Art. 128 to justify its failure to comply with a directive harmonizing national laws on broadcasting activities while the Court affirmed that that article "does not in any way authorize the receiving State, by way of derogation from the system established by Directive 89/552, to make programmes emanating from another Member State subject to further controls" (controls which were on the contrary possible under the Belgian 1987 decree, having a cultural objective and, for this reason, to be construed – in the Belgium's perspective, in the light of Art. 128).

[140] Case C-309/96, *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997], ECLI:EU:C:1997:631. More specifically, in this case an Italian Regional Law, establishing a nature and archeological park meant to safeguard and enhance both the environment and the cultural heritage of the area was considered as falling outside the scope of Community law.

[141] Case C-42/97, *European Parliament v. Council of the European Union* [1999], ECLI:EU:C:1999:81.

sought[142].

However, a less sceptical perspective, directly referring to Art. 167, can be detected in other rulings, such as the *Metronome v. Music Point Hokamp*[143], where this provision was recalled to justify the grant of an exclusive right to authorise or prohibit the rental of protected works – whose compatibility with the right of free enterprise was at stake – underlining the coexistence of a need to ensure the proper functioning of the internal market and to guarantee adequate protection of copyright works, given their "fundamental importance for the Community's economic and cultural development".

The "cultural-sensitive" judgements are also interesting because of their attempt to present an idea of cultural policy for its own sake and not to be conceived merely as an exception to internal market provisions[144], by placing great importance upon the concept of cultural diversity. The need to ensure the latter clearly emerged for example the case, examined by the General Court, *Romania v. European Commission*[145]. Here, the Court, in examining the proposal for a European citizens' initiative entitled 'Minority SafePack – one million signatures for diversity in Europe', namely a set of EU legal acts enabling the promotion of minority rights, clarified the connection between the latter and Art. 167, by affirming that the reference to the strengthening of cultural diversity contained in its fourth paragraph does not imply that the EU has general competence with regard to the protection of people belonging to national minorities, but that "respect for the rights of minorities and the strengthening of cultural and linguistic diversity, as values and objectives of the European Union, must be taken into account in EU actions in the areas covered by the proposed ECI". Thus, Art. 167 was presented as a tool enabling the Union to mainstream cultural diversity – to be interpreted in a broad sense – in its action, somehow also making a step further compared to the previous case-law, in which this link between Art. 167 and safeguard of cultural diversity was not so evident, as

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[142] After having recalled Art. 167(4), Advocate General La Pergola, in his opinion delivered on 5 May 1998, affirms that, the transversal value of culture shown by this provision notwithstanding, not every potential cultural impact can justify recourse to it, but only measures specifically governing cultural action.

[143] Case C-200/96, *Metronome Musik GmbH v. Music Point Hokamp GmbH* [1998], ECLI:EU:C:1998:172.

[144] However, Art. 167 has also been used to justify measures potentially affecting the internal market. See for example the well-known case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelgesellschaft mbH* [2009], ECLI:EU:C:2009:276, regarding national provisions prohibiting importers of German-language books from fixing a price lower than the one which was fixed or recommended by the publisher in the State of publication. Here it was specified by the Court that "Art. 151 [now Art. 167] which provides a framework for the activity of the European Community in the field of culture cannot be invoked as a provision into Community law a justification for any national measure in the field liable to hinder intra-Community trade", at the same time – following the pre-1992 jurisprudence – affirming that the protection of books as cultural objects can be deemed as an overriding requirement in the public interest potentially capable – if proportionate - of justifying measures restricting the free movement of goods.

[145] Case T-391/17, *Romania v. European Commission* [2019], ECLI:EU:T:2019:672.

shown for example by the *UTECA* case[146]. Here the Court, in evaluating the compatibility with the fundamental freedoms of a measure adopted by the Spanish Government allegedly to preserve Spanish multilingualism[147], emphasized the tight link between language and culture and, for this reason, did not share the perspective according to which the Member State's objective of defending its official languages should have been accompanied by additional cultural criteria in order to justify the restriction of one of the fundamental freedoms protected by the Treaties. At the same time, to support this argument, no reference was surprisingly made neither to Art. 167 or to Art. 22 of the Charter of Fundamental Rights of the European Union, both present in the opinion given by the Advocate General[148]: on the contrary, the judges only recalled the UNESCO Convention on the protection and promotion of the diversity of cultural expressions in order to prove the connection between language and culture[149], while to justify the restriction of the fundamental freedoms ensured by the Treaty reference was made to the "overriding reasons relating to the general interest", the latter being an argument already accepted by the Court with reference to the protection of a national language in the aforementioned *Groener* case, dating back to 1989, prior to the introduction of Art.167.

2.3 Positive cultural action after 1992

Exploiting the opportunities offered by Art. 167 – allowing the Community to "grow beyond its purely economic dimension" and to "enjoy unprecedented opportunity for cultural cooperation and support"[150] - and in order to fill with concrete meaning the areas listed – in very general terms – in its second paragraph, three framework programmes were adopted by the European institutions starting from 1996, with the aim of fostering creativity and promoting the diffusion of cultural contents by providing support to the cultural sector: *Kaleidoscope*[151], targeting

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[146] Case C-222/07, *Unión de Televisiones Comerciales Asociadas (UTECA) v. Administración General de Estado* [2009], ECLI:EU:C:2009:124.
[147] More specifically, the measure was introducing an obligation to invest in both cinematographic and television films the original language of which was one of the official languages of the Member State.
[148] Opinion of Advocate General Kokott delivered on 4 September 2008.
[149] Reference was in particular made to paragraph 14 of its preamble, which reads "linguistic diversity is a fundamental element of cultural diversity".
[150] In these terms Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *New prospects for Community cultural action*, COM(92)149 final, at 1.
[151] Decision 719/96/EC of the European Parliament and of the Council of 29 March 1996, establishing a programme to support artistic and cultural activities having a European Dimension, OJ L 99, 20.4.1996.

the fields of performing, visual and applied arts, *Ariane*[152], designed to promote the knowledge and the dissemination of literary works, and *Raphael*[153], supporting European actions dealing with both movable and immovable cultural heritage[154].

Addressing activities with an European dimension – the latter linked either to a cross-border element, namely the involvement of at least three Member States, or to the intrinsic European (and symbolic) nature of projects of great scope, facilitating the diffusion of Member States' culture – these programmes appear to be at the same time pragmatic, fostering cultural cooperation through networks and partnerships, promoting the circulation of cultural works, shedding light on the link between culture and socio-economic development – which, however, does not appear to be of paramount importance – and still attached to the symbolic value of culture, playing an integrationist function from the origin of the European project and promoted through projects of emblematic nature, aiming at strengthening the sense of belonging to the Community[155].

In order to guarantee greater consistency and effectiveness of Community's action, overcoming a potentially detrimental fragmentation[156], these three different sectorial programmes were replaced in 2000 – after extensive consultations involving various actors such as the European Parliament, Member States, the

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[152] Decision 2085/97/EC of the European Parliament and of the Council of 6 October 1997, establishing a programme of support, including translation, in the field of books and reading, OJ L 291, 24.10.1997.

[153] Decision 2228/97/EC of the European Parliament and of the Council of 13 October 1997, establishing a Community action programme in the field of cultural heritage, OJ L 305, 8.11.1997. With regard to Community's action in this sector, it is also worth recalling the Parliament's Resolution on preserving the architectural heritage and protecting cultural assets, OJ C 72, 15.3.1993, at.72, where the need for a coherent Community action integrating considerations on cultural heritage was underlined.

[154] These areas of intervention also mirror the Conclusions of the Ministers of Culture meeting within the Council of 12 November 1992 on guidelines for Community cultural action, OJ C 336, 19.12.1992: here, at 1, with regard to the scope of Community cultural action it is affirmed that "the Community should develop existing activities as suggested in the Commission communication, including action in different cultural sectors: audio-visual ; books and reading ; cultural heritage both movable and fixed; and other forms of cultural expression. Future programmes may specifically include : encouraging the activities of European cultural networks of arts practitioners and cultural institutions such as museums, archives, libraries and monuments; encouraging business sponsorship of the arts; exchanges and training of personnel in the cultural field in support of the activities of Member States; increasing awareness of different cultures and safeguarding the Community's linguistic diversity, as well as promoting respect for shared values".

[155] For the same reason, attention was paid in these three programmes to the issue of public access to culture by citizens, essential to raise awareness on the European dimension and to reinforce this sense of belonging.

[156] The Commission, in its Communication to the European Parliament, the Council and the Committee of the Regions, First European Community framework programme in support of culture (2000-2004), COM(1998)266 final, at 5, underlined that "These actions are many and varied, but often fragmented, which can be detrimental to the Community's image among the European public, who are unaware that such efforts are being made to preserve and promote their cultures or that the cultural dimension is taken into account in furthering European integration".

Council of Europe, the UNESCO and cultural organisations, culminating in the European Union Cultural Forum held in Brussels in January 1998[157] – by a single financing and programming instrument for cultural cooperation[158], namely the *Culture 2000* programme[159], which, with a total budget of €167 million, operated until 31 December 2004 and was then extended to December 2006[160].

With the view of developing a "cultural area common to the European people", the measures implementing this programme followed two different axes. On the one hand, activities directly targeting the cultural sphere were carried out: more specifically, in the Annex to the decision establishing the programme reference was made to the support of specific innovative and/or experimental actions, executed in partnership or in the form of networks between Member States, to the encouragement of closer relations between national operators, cultural bodies and cultural institutions, to special cultural events characterized by a European or international dimension, having a symbolic value (such as the European Capital of Culture or the European Cultural Month)[161].

On the other hand, the need for coordination with other instruments active in the cultural field, aiming at promoting collaboration between sectors characterised by common and converging interests, was emphasised, pointing at possible connections between culture and, for example, tourism, external relations, education and employment[162], in this way also taking in due account the transversal nature of

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157 On the content of these consultations see *supra* at 9.

158 Interestingly, as revealed by the Common Position (EC) No 26/1999 of 28 June 1999 adopted by the Council, OJ C 232, 13.8.1999, at 25, the European Parliament presented an amendment to replace the expression "cultural cooperation" with "cultural policy" which was not accepted by the Council.

159 Decision 508/2000/EC of the European Parliament and of the Council of 14 February 2000, establishing the Culture 2000 programme, OJ L 63, 10.3.2000.

160 Decision 626/2004/EC of the European Parliament and of the Council of 31 March 2004 amending Decision 508/2000/EC establishing the Culture 2000 programme, OJ L 99, 3/4/2004, p. 3.

161 However, in the same years, *Culture 2000* was not the only instrument at the disposal of the Community's institutions to tackle cultural issues. Indeed, special actions aiming at improving language learning were undertook (reference here is to the Decision 1934/2000/EC of the European Parliament and of the Council of 17 July 2001 on the European Year of Languages, OJ L 232, 14.9.2000, encouraging language learning by all persons residing in Member States), together with other measures to foster cultural cooperation, incorporated in 2004 in a programme aiming at promoting bodies active at European level in the field of culture (Decision 792/2004/EC of the European Parliament and of the Council of 21 April 2004 establishing a Community action programme to promote bodies active at European level in the field of culture, OJ L 138, 30.4.2004, at 40).

162 With regard to employment, and more in general to the link between culture and socio-economic development already recalled by the three previous programmes, Culture 2000 appeared to be more concerned of the latter. Indeed, while in the past a very brief reference to it was made, in the decision establishing the new programme a stronger economic rhetoric could be detected, as revealed for example by the reference to the possibility to consider culture as "both an economic factor and a factor in social integration", by the additional economic goal introduced under Art. 1, lett g), making reference again to the "explicit recognition of culture as an economic factor and as a factor in social

culture enshrined in Art. 167.

It appears then possible to affirm that, if *Culture 2000* resembles the programmes it replaced – by still insisting on the concepts of transnational networks and cooperation as well as on the issue of accessibility and on the need to strengthen the sense of belonging of European citizens through symbolic initiatives – it also presents some innovative features, by adopting a more complex approach, exploring the opportunities arising both from trans-sectoral activities, encompassing different cultural sectors[163], and coordination between the cultural sphere and other Community's policies.

Nevertheless, the overly ambitious goals, combined with scarce financial resources and criticalities related to the concrete management of the programme[164], made it necessary to rethink and reshape the Community's cultural action, in order to develop a new plan capable of going further in enforcing cultural cooperation between Member States by focusing on three main goals identified as having "strong European added value"[165], namely transnational mobility of people working in the cultural field, transnational circulation of works of art as well as of artistic and cultural products and, finally, intercultural dialogue[166].

The promotion of networks played once more a central role in the new *Culture*

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integration and citizenship", and by the inclusion of "socio-economic consequences" among the other evaluation criteria used to assess the implementation of the programme itself at Art. 8.

[163] As specified by the second annex to the decision establishing the Culture 2000 programme, the three actions mentioned above, specifically targeting the cultural sector, can follow either a vertical approach, concerning only one cultural field, or a horizontal one, combining different cultural sectors.

[164] See for example the *Report on the programme Culture 2000* published in 2004 by the European Forum for the Arts and Heritage; the *Feasibility Study Concerning the Creation of a European Observatory of Cultural Cooperation* published in 2003 by the ECOTEC Research and Consulting; the *Report on the implementation of the Culture 2000 programme*, drafted by the European Parliament's Committee on Culture, Youth, Education, the Media and Sport, significantly underlining the "mismatch between the wealth of its objectives and the astonishing poverty of its budget". The same problems were also pointed out by the Commission, according to which the vast array of objectives, combined with the low visibility of Community's support action, jeopardized the achievement of the programme's goals, namely increasing the access and the participation of the largest number of citizens to cultural activities and strengthening their feeling of belonging to the Community.

[165] As specified, "the European added value of Community cultural action is generally understood as the synergy effects which emerge from European cooperation and which constitute a distinctive European dimension in addition to Member State level actions and policies in the field of culture".

[166] In these terms both Commission of the European Communities, Report on the Second External Interim Evaluation of the Culture 2000 Programme, COM(2006)666 final, at 10, and Commission of the European Communities, Communication from the Commission, Making citizenship Work: fostering European culture and diversity through programmes for Youth, Culture, Audiovisual and Civic Participation, where it was also affirmed that "The new programme will actively contribute to the bottom-up development of a European identity, by giving cultural operators and citizens more opportunities to create networks, to implement projects, to be more mobile and to enhance the cultural dialogue within Europe and with other parts of the world".

2007-2013 programme, adopted at the end of 2006[167], characterised by a more than doubled budget (€400 million) and by a more limited number of objectives, restricted to the three just mentioned goals having a strong European added value[168] and to be pursued through the implementation of three different categories of measures. More specifically, the Annex to the decision establishing the programme made reference to three different kinds of support, namely the one for specific cultural actions, the one for bodies active at the European level in the field of culture (therefore characterised by a more structural approach and not by a project-based one) and, finally, the one for analyses and dissemination activities, aiming at fostering the exchange of good practices and experiences.

Overall, this programme appears to be more pragmatic if compared with the previous one, developing that instrumental value of culture already sketched in 2000[169] and emerging also from the Commission's communication on a European agenda for culture in a globalizing world adopted in 2007, built on the enhancement of cultural diversity and intercultural dialogue, on the promotion of culture as an essential element in the Union's international relations and on the "promotion of culture as a catalyst for creativity in the framework of the Lisbon Strategy for growth and jobs"[170], goals which, however, were considered as coexisting on the same

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[167] Decision 1855/2006/EC of the European Parliament and of the Council of 12 December 2006, establishing the Culture Programme *(2007-2013)*, OJ L 372, 27.12.2006, at 1.

[168] Interestingly, access to culture – a standard feature of the previous programmes – was this time removed from the goals of Community's action, reference to it being made only in the preamble.

[169] In that regard, the fourth point of the preamble of the decision establishing the programme significantly affirms that "It is essential that the cultural sector contribute to, and play a role in, broader European political developments. The cultural sector is an important employer in its own right and there is, in addition, a clear link between investment in culture and economic development, hence the importance of reinforcing cultural policies at regional, national and European level. Accordingly, the place of cultural industries in the developments taking place under the Lisbon Strategy should be strengthened, as these industries are making an increasingly large contribution to the European economy". On the contrary, in the 2000 decision, the reference to the economic side of culture notwithstanding, the fifth point of the preamble called for a better balance between the economic and the cultural aspects of the Community, "so that these aspects can complement and sustain each other".

[170] Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions on a European agenda for culture in a globalizing world, SEC(2007)570, at 8. Remarkably, in the same Communication the Commission also proposed the application of the Open Method of Coordination, already used in many European policy areas such as education and innovation ones, in the cultural field, in order for Member States "to take their cooperation one step further". In order to fully take into account the specificity of this particular sector, the Resolution of the Council of 16 November 2007 *on a European Agenda for Culture* (OJ C 287, 29.11.2007), which launched the OMC in the latter, underlined at p. 3 that the new approach proposed by the Commission would have provided "a flexible and the non-binding framework for structuring cooperation around the strategic objectives of the European Agenda for Culture and fostering exchanges of best practices". For an in-depth analysis of the cultural OMC as a framework for policy coordination see MATTOCKS, K., *'A few sparks of inspiration'?: analysing the outcomes of European Union cultural policy coordination*, in *European Politics and Society*, 2018, vol. 19, issue 1, 20-34, PSYCHOGIOPOULOU, E., *The Cultural Open Method of Coordination: a New but Different OMC?* in *European Papers*, 2018, vol. 3, issue 1, 257-279.

level[171].

A more industrial shift[172], emphasising the economic potential of culture and anticipated by mainly Commission-led documents[173], can be detected in the programme which followed the Culture 2007-2013 one, namely *Creative Europe*[174]. With a significantly increased budget (€1.46 billion), the latter provided support to both cultural and creative sectors, by merging them[175] and by addressing these two areas through two independent sub-programmes[176], in order to reinforce their adaptation to both globalisation and digital shift and to avoid market fragmentation, shedding light on the culture's role "as a catalyst for creativity in the framework for growth and jobs". Although being the product of a compromise between two different perspectives – namely the Commission's one, insisting on new technologies and culture's connection with growth, and the Parliament's and Council's ones, more attentive to issues related to cultural diversity[177] – the more economic mindset

[171] This is underlined also by SIEVERS, N., WINGERT, C., *Von der Kulturverträglichkeit zur Wirtschaftsverträglichkeit*, in *Kulturpolitische Mitteilungen*, 2012, issue 136, at 37.

[172] On Creative Europe's industrial turn see BRUELL, C., *Creative Europe 2014-2020: A New Programme – A New Cultural Policy As Well?*, Stuttgart, Ifa Edition Culture and Foreign Policy, 2013. More in general, on the industrial turn see LITOZ-MONNET, A., *Encapsulating EU Cultural Policy into the EU's Growth and Competiveness Agenda: Explaining the Success of a Paradigmatic Shift in Brussels*, in PSYCHOGIOPOULOU, E. (eds), *Cultural Governance and the European Union*, London, Palgrave Macmillan, 2015.

[173] See for example the Commission's Green Paper Unlocking the potential of cultural and creative industries, COM(2010)183 final, underlining not only the contribution of creative and cultural industries (CCI) to GDP but, more in general, their role as "important drivers of economic and social innovation in many other sectors", once more insisting on the need of synergies between the cultural sector and other sector also in order to exploit its "untapped potential" to create growth and jobs. The "Lisbon potential" of the CCI, to be unleashed through a specific strategy, is also mentioned in KEA European Affairs, *The economy of culture in Europe*, 2006.

[174] Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, OJ L 347, 20.12.2013, at 221.

[175] Creative Europe not only replaced the Culture 2007-2013 programme, but also incorporated the MEDIA and the MEDIA Mundus programmes, supporting the audio-visual sector.

[176] Moreover, a cross-sectoral strand was also established, to address common challenges and opportunities. For example, for both cultural and creative industries the so-called Guarantee Facility was introduced, a new market-led instrument, managed by the European Investment Fund, integrating grant funding by encouraging financial intermediaries to issue loans to creative and cultural industries, aiming at improving access to finance for SMEs.

[177] For example, the Council decided to introduce a new article in the Commission's proposal in order to ensure a better balance between the acknowledgement of the economic dimension and the intrinsic and social value of culture, to modify the provision on the European added value in order to give account of this duality of culture and to insert a new recital on a shared cultural area, creating some kind of continuity with the previous support programmes (the reference here is to Recital 9, referring to the transnational mobility of cultural and creative players, of cultural and creative works, and to intercultural dialogue). For an overview of the negotiations which led to the final version of the programme see KANDYLA, A., *The Creative Europe Programme: Policy-Making Dynamics and Outcomes*, in PSYCHOGIOPOULOU, E., *supra*, at 163, 49-60.

It appears worth underlining that this attempt to reconcile the economic-oriented approach and the one taking into account the intrinsic value of culture is also revealed by the general objectives of the programme: in addition to the goal to strengthen the competitiveness of the European cultural of the programme clearly emerges, as also indirectly shown by its legal bases[178] and by the performance indicators to be used for its evaluation[179], and not only when dealing with the MEDIA sub-programme, aiming at reinforcing the European audio-visual sector's capacity to operate transnationally, but also when moving to the priorities of the Culture sub-programme – the one properly replacing the previous *Culture 2007-2013*.

Creative Europe is, at the present time, the main support programme for the cultural and creative sectors, however, its newest edition – namely *Creative Europe 2021-2027*[180] – shows traces of the change in EU's guiding priorities. Indeed, the prevalent economic approach characterising the first version of the programme – also confirmed by the need to line up with the Commission communication entitled *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, explicitly recalled in Recital n. 7 – is replaced by a renewed attention to the social dimension, detectable both in the programme's objectives, to be pursued "in a way that encourages inclusion, equality, diversity and participation"[181], and in the evaluation indicators, introducing among the ones regarding the cultural strand the number of projects supported by the programme and targeting socially marginalised groups, while once more no reference is made to the impact on cultural diversity.

The latter is more directly addressed by special cultural actions which, as specified by the Annex I to the programme, "aim to render European cultural diversity and heritage visible and tangible and to nurture intercultural dialogue": reference here is made to predominantly symbolic measures, such as the European Heritage Days[182],

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and creative sectors in order to foster smart, sustainable and inclusive growth, explicit reference was indeed made to the one to "safeguard, develop and promote European cultural and linguistic diversity and to promote Europe's cultural heritage". Similarly, among the specific objectives (Art. 4), besides the more economic-oriented ones, attention was paid not only to the transnational circulation of cultural and creative works and players, but also to the objective to "reach new and enlarged audiences and improve access to cultural and creative works in the Union and beyond, with a particular focus on children, young people, people with disabilities and under-represented groups".

[178] Beside Art. 167(5) TFEU, reference to Artt. 166(4) and to Art.173(3), regarding the Union's role in implementing a vocational training policy and in ensuring the conditions necessary for the competitiveness of the Union's industry respectively, was made.

[179] Interestingly, among these indicators, for what concerns the ones related to the objectives referred to in Art. 3 – namely the one mentioning cultural and linguistic diversity – none of them made reference to the latter (Art. 22 of the Charter of Fundamental Rights notwithstanding), on the contrary focusing on elements such as changes in the level of employment, in the share of gross domestic product, in the number of people accessing cultural and creative works.

[180] Regulation (EU) 2021/818 of the European Parliament and of the Council of 20 May 2021, establishing the Creative Europe Programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013, OJ L 189, 28.5.2021, at 34.

[181] Art. 3, par. 5.

[182] This initiative – launched in 1985 by the Council of Europe and joined in 1999 by the European Union – involves the 50 signatory countries to the European Cultural Convention of 1954 and, through the events organised in collaboration with national coordinators, aims at fostering interest in Europe's cultural heritage and at raising awareness of Europe's cultural richness and diversity.

the European Heritage Label (EHL)[183] and the European Capitals of Culture (ECOC)[184]. With regard to the last two initiatives, however, it is also interesting to notice that the purely symbolic original aim has been also complemented by an economic one: this aspect – less marked when analysing the decision establishing the ECH and the overall process which led to it[185] – emerges in particular with regard to the ECOC initiative. More specifically, the most recent edition of the initiative[186], if compared with the previous ones[187], shows a greater emphasis on its economic impact[188], as suggested for example by the explicit reference to the Creative Europe programme – characterised, as already underlined, by a pronounced economic

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[183] Started as an intergovernmental action in 2006, the EHL turned into a EU action in 2011 (Decision 1194/2011/EU of the European Parliament and the Council of 16 November 2011 establishing a European Union action for the European Heritage Label), following an invitation made by the Council (Council conclusions on the creation of a European heritage label by the European Union, OJ C 319, 13.12.2008, at 11), in order to strengthen European citizens' sense of belonging to the Union through their common heritage and to reinforce dialogue between cultures.

[184] Also in this case, the initiative started as an intergovernmental action to later become – in 2005 – an EU level action (Decision 1419/1999/EC of the European Parliament and of the Council, OJ C 115, 16.5.2006, at 56).

[185] Indeed, if on the one hand the Commission – both in its initial proposal for a decision of the European Parliament and of the Council establishing the EHL, COM(2010)76 final and in the impact assessment accompanying it – underlined the potential economic benefits that can be expected from the EHL's impact on the local tourism industry, on the other hand the same impact assessment significantly clarifies the primary symbolic dimension of the initiative, by affirming that "It should be noted that the economic dimension of the EHL, notably linked to tourism, has been included only through specific and operational objectives related mainly to the marketing and the promotion of the sites. This is due to a number of factors. Firstly, as mentioned earlier, during the consultation process many stakeholders insisted that the primary effects of the EHL will be and should be social ones and they warned that stressing the economic objectives too much might blur the message of what the label is trying to achieve. The EHL may stimulate tourism and associated gains, but it is most appropriate to see these as secondary, indirect benefits".
Moreover, an attempt to find a balance between the two different dimensions also emerges from the final decision establishing the Label: if, among the objectives set by Art.3, the specific goal of "contributing to the attractiveness and the economic and sustainable development of regions, in particular through cultural tourism" is included, at the same time the symbolic dimension of the initiative does not appear to be recessive, as shown by Recital 9, according to which the action *could* contribute to increasing the role of heritage in the economic and sustainable development of regions, *in addition* to strengthening European citizens' sense of belonging and intercultural dialogue (the latter considered as general objectives of the initiative by the aforementioned Art.3).

[186] Decision 445/2014/EU of the European Parliament and of the Council establishing a Union action for the European Capitals of Culture for the years 2020 to 2033 and repealing Decision 1622/2006/EC, OJ L 132, 3.5.2014, at 1.

[187] Decision 1419/1999/EC of the European Parliament and of the Council establishing a Community action for the European Capital of Culture event for the years 2005 to 2019, OJ L 166, 1.7.1999, at 1; Decision 1622/2006/EU of the European Parliament and of the Council establishing a Community action for the European Capital of Culture event for the years 2007 to 2019.

[188] On the evolution of the ECOC action, see PATEL, K. K. (eds), *The Cultural Politics of Europe: European Capitals of Culture and European Union since the 1980s*, London, Routledge, 2013. In particular, on the economic turn, see, in this Volume, MITTAG, J., *The changing concept of the European Capitals of Culture – Between the endorsement of European identity and city advertising*, 39-54, and SASSATELLI, M., *Europe's several Capitals of Culture – From celebration to regeneration to polycentric capitalization*, 55-71.

approach – on the contrary absent in the decision establishing the EHL[189], or by the inclusion of "the envisaged long-term cultural, social and economic impact, including urban development, that the title would have on the candidate city" among the criteria for the assessment of applications listed in Art. 5 of the 2014 decision. This new kind of approach somehow replaces the cautiousness expressed by the European Commission in its ex post evaluation of the 2009 European Capital of Culture event, where it agreed to investigate the extent to which the ECOC initiative - and culture more generally - could and should be used to provide incentives to cities to stimulate urban regeneration and economic development, or whether "to return to an approach that is more about culture as an end in itself"[190].

3. Concluding remarks: between culture's instrumentality and culture for its own sake

As revealed by both the *Creative Europe* programme and the EU level actions in the cultural field, culture tends to lend itself to an instrumental use, being capable for example of producing a positive spillover effect in economic terms or to combat social exclusion. However, as also shown by the integrationist function it played from the very origin of the European project – and in a more marked way starting from the 1980s, when the need to strengthen the European sense of belonging to the Community was particularly urgent – it would be also difficult to consider cultural policy as a tool to achieve purely cultural goals and not as an instrument to pursue (also) different objectives, either through more symbolic measures or more pragmatic ones.

This is the reason why, leaving the general issues related to the instrumentalization of culture and of the tension between its intrinsic and instrumental dimensions in the background – always given, at any rate, the need to take into due account the consequences arising from what it has been defined a "hyperinstrumentalism" of cultural policy[191] – it seems more appropriate to stress the "multiplication of culture's utility"[192] which took place over the years.

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[189] More in detail, Recital 7 affirms that the objectives of the action established in the decision "should be fully in line with the objectives of the Creative Europe programme […] which aims to safeguard, develop and promote European cultural and linguistic diversity, to promote Europe's cultural heritage and to strengthen the competitiveness of the European cultural and creative sectors".

[190] European Commission, Report from the Commission to the European Parliament, the Council and the Committee of the Regions, Ex Post evaluation of the 2009 European Capital of Culture event (Linz and Vilnius), COM(2010) 762 final.

[191] GRAY, C., HADLEY, S., *Hyperinstrumentalism and cultural policy: means to an end or an end to meaning?* in *Cultural Trends*, 2017, vol. 26, issue 2, 95-106.

[192] BENNETT, T., *The Multiplication of Culture's Utility*, in *Critical Inquiry*, 1995, vol. 21, issue 4, 861-889.

However, attention has to be paid to the criticalities potentially resulting from the overlap of cultural goals and different ones, as also emerging from a special report issued by the European Court of Auditors in 2020[193]: here, in assessing the economic, social and cultural effects of investments made through the European Regional Development Fund (ERDF) in cultural sites, the Court, when concluding by pointing out the lack of an appropriate framework to ensure the effectiveness and sustainability of ERDF investments in those sites, stressed the fact that, in terms of EU funding, culture mainly represents a means of pursuing other EU priorities and objectives, such as regional development and tourism[194]. More specifically, according to the Court, the prevailing economic nature of the goals pursued by ERDF projects – confirmed by the tendency, shown by most managing authorities, not to even consider cultural aspects as a criterion when selecting projects to fund – results in an inability to fund the preservation of endangered sites unless an immediate and economic and social effect can be obtained, not to mention the fact that tourist promotion strategies, through which the generation of economic impact is often performed, can also prove to be counterproductive to the preservation of heritage sites.

The possibility of achieving different objectives through cultural policy can be also linked to the progressive expansion of the notion of culture itself. Indeed, always given the reluctance of EU institutions to provide a proper definition of it – possibly also because of its representing a concept open to evolving interpretations[195] – it should be noted that, in the last decades, the Commission embraced a rather wide notion of it. This emerges for example from a communication dating back to 1998, where the Commission significantly affirmed that "culture is no longer restricted to 'highbrow' culture (fine arts, music, dance, theatre, literature). Today the concept also covers popular culture, mass produced culture, everyday culture"[196], or from the aforementioned 2007 European Agenda

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193 European Court of Auditors, *Special Report 08/2020: EU investments in cultural sites: a topic that deserves more focus and coordination*.

194 "The strategic framework for culture is also only partially reflected in EU funding. Cultural aspects are incorporated, or 'mainstreamed', into different policies, and are mainly seen as a resource to help achieve other EU priorities and objectives through different EU funds", par. 97 of the report.

195 On the several meanings of culture see for example EAGLETON, T., *The Idea of Culture*, Hoboken, Wiley-Blackwell, 2000, CARTA, C., HIGGOTT, R., *Cultural diplomacy in Europe. Between the Domestic and the International*, London, Palgrave Macmillan, 2020.

On the conception of culture in EU law see CRAUFORD SMITH, R., *The Evolution of Cultural Policy in the European Union*, in CRAIG, P., DE BÚRCA, G., *The Evolution of EU Law*, Oxford, Oxford University Press, 2011, 869-895, at 872.

196 European Commission, Communication on the first European Community framework programme in support of culture, COM(1998)266 final, at 3. As noted by SASSATELLI, M., *Imagined Europe*, at 448, it is in its vision as 'way of life' (values, customs, ideas, politics) that culture becomes "the defining feature of a community, while the products of high culture tend to claim a universal value". On this basis, in the opinion of the author "the emphasis on high culture is functional to the overcoming of national cultural boundaries, but becomes a weakness when applied to the

for Culture in a Globalizing World, where – aware of the fact that culture can both refer to fine arts and have an anthropological meaning[197] – it focused "on the importance of the various facets of culture in developing strategies both within the EU and with third countries"[198].

Of course, this broad conception of culture becomes problematic as soon as cultural concerns encounter EU guaranteed freedoms, such as the one related to the freedom of movement, or competition law rules, namely the ones established to ensure the functioning of the internal market[199] and which will be examined in the present work, at times also enabling derogations from them, as for example shown the aforementioned Art. 107 TFEU. In these cases – as it will be clarified by Chapter III, in-depth analysing the cultural derogation in state aid law – it appears at times possible to witness a splitting between the proper cultural goals – the ones properly referable to Art. 167 TFEU, mainly symbolic and related to cultural diversity concerns – and the ones to which culture is intertwined with and functional to, splitting which might also take place by drawing a divide between culture and cultural industries, to which the economic feature is inherent.

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construction of a new community". Therefore, the adoption of a broader notion of culture can be also considered as functional to the European integration process, somehow complementary to the aforementioned cultural actions aiming at strengthening the European citizens' sense of belonging.

197 This anthropological value "it is the basis for a symbolic world of meanings, beliefs, values, traditions which are expressed in language, art, religion and myths. As such, it plays a fundamental role in human development and in the complex fabric of the identities and habits of individuals and communities" (European Commission, *supra*, at 163, 3).

198 *Ibid.* The reference to those various facets of culture is no longer present in the 2018 New European Agenda for Culture. The anthropological rather than artistic meaning of culture is recalled only in the Commission staff working document accompanying the latter, with specific regard to the European projects promoting active European citizenship, somehow confirming the aforementioned connection between reinforcement of European citizens' sense of belonging and broader notion of culture.

199 According to Art. 3 TFEU, the Union shall have exclusive competence in establishing the competition rules necessary for the functioning of the internal market, meaning that, in addition to the already existing tensions between cultural and market concerns, another layer of complexity is as evident given by the fact that the Union has an exclusive competence with regard to competition and a subsidiary one when it comes to cultural policy.

Chapter II - The roots of a possible conflict between cultural and competition policy

In the previous Chapter, light was shed on the cultural mainstreaming clause, namely Art. 167(4) TFEU, stating the Union's obligation to take cultural aspects into account in its overall action and consequently leaving the door open to potential friction with EU policies otherwise not directly culturally concerned.

Now the analysis will be more specifically devoted to the potential conflict with competition, to be examined after a brief overview of the changes this policy went through after the Treaty of Lisbon – which removed the reference to it from the EU activities listed in Art. 3 TEU – and by giving account, more in general, of the tensions between competition law and public policies. More specifically, the sponge-like characteristics of competition law will be highlighted, together with the possibility of resorting to policy-linking clauses, such as the cultural one, to pursue broader public policy goals, other than the ones related to market integration. The role played by the policy linking clauses appear indeed to be rather significant – especially when cultural considerations are addressed – because of their capability of favouring an integrationist approach of economic and non-economic interests, to be placed besides an approach on the contrary based on the mutual exclusion between such interests and thus requiring an exemption from economic rules when non-economic considerations – in the present work cultural ones – are at stake. In the light of that, although it remains outside the scope of this work, attention will be paid also to the conflict between culture and trade at the international level, mainly to recall the role played by the European Union in favouring a shift from the (negative) concept of cultural exception to the (positive) one of cultural diversity, implying what will be defined an "integrationist method". The complementarity between these two different approaches will be then underlined, in order to show how culture and competition are not bound to be sworn enemies, in the light of the possibility – depending on the branch of competition law examined, as it will be made clear in the following Chapters – of making the latter culturally sensitive while establishing *ad hoc* exemptions when the "integrationist method" does not appear to be available.

1. The Treaty of Lisbon: a call for greater balance?

The rather minor amendments to substantive provisions on competition notwithstanding, the Treaty of Lisbon – bucking the trend started by the draft Treaty establishing a Constitution for Europe[200] – caused relevant turbulence in EU competition law by removing the reference to "undistorted competition" among the fundamental provisions of the TEU[201], therefore calling into question its role in the EU Treaties. More specifically, Art.3(1)(g) – according to which the activities of the Community aiming at achieving the goals set by Art.2 included "a system ensuring that competition in the internal market is not distorted"– was excised.

If, one the one hand, it appears undeniable that this Article – at times also defined as a "main objective"[202], "fundamental provision"[203] or also "general principle"[204] of EU law – had been used over the years by the CJEU in order to allow an expansive application of Treaties' substantive competition provisions[205], on the other hand it

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[200] The draft Treaty listed competition among the objectives of the Union, not only as among its guiding principles. In particular, Art. I-3(2) stated that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted". Moreover, as recalled by LIANOS, I., *Competition law in the European Union after the Treaty of Lisbon*, in ASHIAGBOR, D., COUNTOURIS, N., LIANOS, I., *The European Union after the Treaty of Lisbon*, Cambridge, Cambridge University Press, 2012, competition was also presented as the "fifth freedom" and included in the chapter on the internal market: as a consequence, it was also elevated to the rank of the fundamental freedoms of movement.

[201] The removal is generally attributed to the pressure by the French delegation. As underlined by the former President Sarkozy by the end of the negotiations leading to the Lisbon Treaty: "Nous avons obtenu une réorientation majeure des objectifs de L'Union. La concurrence n'est plus un objectif de l'Union ou un fin en soi, mais un moyen au service du marché intérieur" (see the press conference of the former French President of 23 June 2007 available here).

[202] Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECLI:EU:T:2005:331.

[203] Case C-453/99, *Courage Limited v. Crehan* [2001] ECLI:EU:C:2001:465, or case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECLI:EU:C:1999:269.

[204] Case 240/83, *Procureur de la République v. ADBHU* [1985] ECLI:EU:C:1985:59.

[205] See for example case C-198/01, *CIF v. Autorità Garante della Concorrenza e del Mercato Consorzio* [2003], ECLI:EU:C:2003:430; Case C-13/77, *SA G.B.-Inno-B.M. v. ATAB* [1977], ECLI:EU:C:1977:185, where this Article was used in order to underline that, in spite of the fact that state aids' prohibitions address undertakings only, they also prohibit Member States from adopting measures enabling the latters to infringe these provisions. Another example of this tendency to make use of Art.3(1)(g) in order to expand the application of competition rules can be also detected in case 85/76 *Hoffmann-La Roche v. Commission* [1979], ECLI:EU:C:1979:36, where the Court affirmed that the rules concerning anticompetitive agreements must be interpreted and applied in the light of both the principle of undistorted competition enshrined in Art.3(1)(g) and Art.2, giving the Community the task of promoting "throughout the Community a harmonious development of economic activities".

It also appears useful to recall case C-6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973], ECLI:EU:C:1973:22, where the judges expanded the concept of abuses of a dominant position prohibited by the Treaty by relying on the need to ensure undistorted competition (at that time Art.1(f) of the EC Treaty). However, at the same time, in the same ruling the Court also highlighted the link between competition and other, more general Community's aims, recalling for example that: "If Article 3 (f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of Article 2 of the Treaty according to which one of the tasks of the Community is 'to promote throughout the Community a harmonious development of economic activities'. Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of seems also worth underlining that, at the same time, competition was already considered as an activity to pursue the aims established by Art.2[206] and that the tendency to define it as "objective" – which could be at times detected both in the legislation and in some CJEU's decisions, such as the aforementioned ones – might be reconnected to the differentiation between long-term objectives (*Fernziele*) and immediate ones (*Naheziele*), the latter to be considered as instrumental to the former[207].

However, even though according to some Authors the suppression of Art.3(1)(g) led to a downgrade of its constitutional status[208], it must be noted that a reference to the principle of undistorted competition can now be found in Protocol No.27 on the Internal Market and Competition[209], which – as specified by the CJEU right in the aftermath of the Lisbon Treaty[210] and also reaffirmed by the former Commissioner Kroes[211] – forms an integral part of the Treaties, also in accordance with Art. 51 TEU[212].

Thus, the removal of Art.3(1)(g) does not seem to reduce the weight of competition policy in the overall system but rather – in a more symbolic way and in

the Treaty, are limited by the requirements of Articles 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market".

206 As also recalled for example by PETITE, M., *Letters to the editor: EU commitment to competition policy is unchanged*, in *Financial Times*, 27 June 2007: "As a matter of fact, competition is not currently one of the objectives of the European Community set out in Article 2 of the EC Treaty: the reference to "undistorted competition" appears only in Article 3 on the Community activities to be implemented to attain those objectives. Clearly, an objective that does not exist cannot be lost!".

207 This differentiation was theorised in BASEDOW, J., *Zielkonflikte und Zielhierarchien im Vertrag über die europäische Gemeinschaft*, in DUE, O., LUTTER, M., SCHWARZE, J. (eds), *Festschrift für Ulrich Everling*, Baden Baden, Nomos, 1995, 49-68.

208 See, among others, RILEY, A., *The EU Reform Treaty and the Competition Protocol: undermining EC Competition Law*, in *CEPS Policy Brief*, 2007, n. 142, GRAUPNER, F., *The Battle over the Role of European Competition Policy: now you see it, now you don't*, in *Competition Law Journal*, 6, 89-100.

209 THE HIGH CONTRACTING PARTIES, CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted, HAVE AGREED that: to this end, the Union shall, if necessary, take action under the provisions with of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union. This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union". The reference to the residual power clause contained in Art.352 TFEU plays a very important role, preserving the Union's legislative powers in competition policy field.

210 See case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011], ECLI:EU:C:2011:83, where the Court referred to the Protocol for the first time by putting it in direct relation with the EU duty to establish an internal market, and case C-496/06, *Commission v. Italian Republic* [2011], where it reaffirmed the connection between the Protocol and Art.3 and – in more explicit terms – recalled the "vital nature" of the rules on competition and, by combining Art.3(3) TEU and Protocol No.27, underlined the gravity of state aid's rules infringement.

211 In her 2007 speech *A renewed commitment to competition policy in Europe* available here, Kroes affirmed: "So I simply do not agree with the scaremongers who argue that the Protocol is the end of European competition law as we know it. The Protocol maintains in full force the competition rules which have served European citizens so well for fifty years".

212 "The Protocols and Annexes to the Treaties shall form an integral part thereof".

line with the *animus* of the Lisbon Treaty, introducing the reference to social market economy in Art.3 TEU and, more in general, leading to a shift to the social dimension by broadening the basic goals of the EU – to call for a greater balance between competition and not economic goals. This – to a certain extent – "cosmetic" modification, however, appears to be in accord with a trend which already started, in very general terms, after the Single European Act[213], and which seems to go hand-in-hand with the progressive expansion of the Union's agenda. More specifically, starting from the mid-1980s, it is possible to detect many attempts – rooted themselves into a pre-existing tendency to consider competition as inserted in a more complex scenario[214] – to present competition, conceived in the first place only to create a single market[215], as a tool to achieve broader goals[216].

The relevance of the Treaty of Lisbon, however, does not lie only in the excise of Art.3(1)(g); indeed, attention should be paid also to other provisions, once more affirming the need to place competition among different policies and to carry out a balance exercise between them. In this regard, it seems important to recall the introduction of the general policy-linking clause which can be now found in Art.7 TFEU, according to which "the Union shall ensure consistency between its policies

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[213] As noted by VAN ROMPUY, B., *Economic Efficiency: The Sole Concern of Modern Antitrust Policy*, Alphen aan den Rijn, Kluwer Law International 2012, at 173.

[214] See for example the reference to the need to consider competition provisions in the light of the broader Community goals in the aforementioned *Continental Can* judgement.

[215] The need to reassess the role of competition in the new scenario is underlined for example by GERBER, D., *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford, Oxford University Press, 2001, at 388. More specifically, according to the Author: "Since the mid-l980s, the dynamic of this system has been changing along with its goals and methods and the roles of its institutions. A central factor in this changing dynamic is the success of integration itself. Driven and defined throughout its history by the goal of creating a single market for Europe, the competition law system must increasingly operate with a reduced role for its former lodestar. A system constructed and maintained to achieve one primary goal now faces fundamental questions about what it is doing and why. It must redefine its mission. This need for redefinition has already begun to destabilize the system's conceptual framework and suffuse it with uncertainty".

[216] See for example the XX Report on Competition Policy drafted by the Commission 1990, where competition is considered "not a marginal instrument of Community policies, isolated from the mainstream of events" but on the contrary "an integral and essential element of a whole range of Community activities", or the XXII version of the same document, drafted in 1992, according to which "Competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context. Rapid changes in that context call for rigorous consistency and steadfastness in applying the competition rules, combined with greater flexibility in adapting to the new situation and staying in tune with the objectives which the Community has set itself for economic and social cohesion, industrial competitiveness, research and technological development, and the environment". In more general terms, this tendency to question the competition policy's role in an increasing complex scenario can be detected in ECONOMIC AND SOCIAL COMMITTEE, *Opinion on the 17th Report on Competition Policy*, OJ C 71, 20.03.1989, 22 ff., where it was affirmed that: "The competition policy pursued by the Commission should be a fullyfledged instrument of the Community's economic and social policy. With the single market now on the horizon, the concepts and aims of competition policy should be clearly spelled out in order to define effectively its contribution as part of a broader policy and ensure that henceforth it has the full backing of the Member States".

and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”[217].

2. The policy-linking clauses

The general policy-linking clause does not represent, however, a novelty in the European framework. Indeed, the Treaties also contain several sectorial horizontal clauses, as anticipated when introducing Art.167(4), namely the one applying to the cultural sector. These provisions – covering a large range of fields and gradually inserted in the Treaties, starting from 1987[218] – ensure the integration of sectorial

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[217] This provision is also mirrored in Art.13(1) TEU, according to which “The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions”.

[218] Indeed, the first cross-sectional clause was introduced by the Single European Act (OJ L 169, 29.6.1987, 1 ff.), which, in its Art.130(r)(2), reads: “Environmental protection requirements shall be a component of the Community’s other policies”. This provision was then strengthened in 1992 by the Treaty of Maastricht, which in clearer terms in Art.130(r)(2) of the amended version of the Treaty of the European Union (OJ C 191, 27.9.1992) stated that: “environmental protection requirements must be integrated into the definition and implementation of other Community policies” (as affirmed nowadays by Art.11 TFEU).
The same Treaty also introduced new policy-linking clauses for **public health** (*Ibid.* at Art.129.1, now Art.168 TFEU, according to which “a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”), **economic and social cohesion** (*Ibid.* at Art.130.b, now Art. 175 TFEU, stating that “the formulation and implementation of the Union’s policies and action and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement”, where Art.174 affirms that “In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions”), **development cooperation** (*Ibid.* at Art.130.v, now Art.208 TFEU, according to which “Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”) and **industrial policy** (*Ibid.* at Art.130.3, now Art.173 TFEU, affirming in par.1 that “The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union’s industry exist” and then that “the Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties”).
Further mainstreaming obligations were then added by the Treaty of Amsterdam (OJ C 340, 10.11.1997, 1 ff.) – which introduced a horizontal clause on **gender equality** (*Ibid.* at Art. 2, now Art. 8 TFEU, according to which “in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”), on **consumer protection** (*Ibid.* at Art.129a, now Art.12 TFEU, according to which,) and on **employment** (*Ibid.* at Art.109p, now Art. 147.2 TFEU, stating that “the objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities – and by the Treaty of Lisbon itself, which added mainstreaming clauses for **social policy** (Art.9 TFEU, according to which “in defining and implementing its policies and activities the Union shall take into account

considerations, related for example to environment or to public health, in the EU overall action, in this way also allowing to achieve specific objectives of the Union more effectively. However – given that their capability of concretely influencing EU action is at any rate disputed, also in the light of their very broad wording[219] – specific issues of effectiveness are posed by those clauses requiring certain interests to be *taken into account* – a weaker formula if compared to other provisions according to which specific considerations *shall be ensured* or *must be integrated* in EU action[220] –

requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health"), **equal protection** (Art.10 TFEU, complementing the action of Art.8 and affirming that "in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation), **animal welfare** (Art. 13 TFEU, stating that "in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage"). According to JANS, J.H., *Stop the integration principle?*, in *Fordham International Law Journal*, 2011, vol. 33, issue 5, 1533-1547, a proper "proliferation of integration principles" took place after the Lisbon Treaty.

[219] For a recent analysis of how the CJEU addressed the mainstreaming clauses set by Artt. 8-13 TFEU see PSYCHOGIOPOULOU, E., *The Horizontal Implications of Arts 8-13 TFEU: Normative Implications, Implementation and Potential for Mainstreaming*, in *European Papers*, 2022, vol. 7, no. 3, 1357-1380. The lack of a direct effect of these clauses is underlined e.g. in LIANOS, I. cit., and in ODUDU, O., *The Boundaries of EC Competition Law: the Scope of Article 81*, Oxford, Oxford University Press, 2006.

[220] If, for instance, the environmental and the public health cross-sectional clauses are taken into account, their capability of influencing EU action appears to be at times greater - probably because of its more effective wording – and this led the CJEU to consider the protection of environment and public health to be prioritised. For example, in case C-180/96, *United Kingdom v. Commission* [1998] ECR I-2265, the Court, in scrutinizing a Commission's ban of bovine meats' exports during the BSE crisis, justified it by combining the environmental integration clause and another provision listing the protection of human health among the objective of the environmental policy, affirming that "where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent", in this way directly grounding precautionary measures on an integration principle. By referring to this judgement, in more explicit terms the General Court, addressing Commission's decisions to withdraw national authorisations for the commercialisation of certain medical products, affirmed that "the aforementioned conditions for withdrawal of an authorization must be interpreted in accordance with the general principle, identified in the case-law, that protection of human health must unquestionably take precedence over economic considerations" (see the joined cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00, T-141/00, *Artegodan and others v. Commission* [2002], ECLI:EU:T:2002:283. At the same time, it appears also interesting to recall the perspective adopted by AG Gelhoed in case C-161/04, *Austria v. Parliament and Council* [2006], ECLI:EU:C:2006:512: here the AG, referring to the environmental mainstreaming clause, affirmed that "although this provision is drafted in imperative terms […] it cannot be regarded as laying down a standard according to which, in defining Community policies, environmental protection must always be taken to the prevalent interest. Such an interpretation would unacceptably restrict the discretionary powers of the Community institutions and the Community legislature. At most it is to be regarded as an obligation on the part of the Community institutions to take due account of ecological interests in policy areas outside that of environmental protection strictu sensu". However, if those provisions cannot be considered as ensuring the

and/or not placed under Title II TFEU, namely "Provisions having general application", but on the contrary scattered in the Treaties, as in the case of Art.167(4).

In other words, although it is undisputed that these provisions formalised the European institutions' duty to find a balance between competition – the latter being an EU policy and therefore touched by this obligation – and different non-economic interests[221], the lack of specific guidelines to follow when applying these cross-sectional clauses tends to be rather problematic, especially when "weaker" mainstreaming provisions – such as the one related to culture – are at stake: indeed, in such cases the mainstreaming clauses do not place upon the EU institution a duty to maximise interests they aim at safeguarding[222].

Nonetheless, these provisions still prove to be useful especially when they are meant to ensure the integration of considerations connected to objectives for the achievement of which the Union is not endowed with law-making competences, enabling the EU to take into account specific interests when acting in fields in which its competence is not restricted to supplementing MS' action – therefore also when carrying out competition policy - in order to counterbalance the weak instruments at its disposal in specific sectors, such as the cultural one[223]. Art.167(4) represents a clear example of this phenomenon: moreover, thanks to this mainstreaming clause, the Union might have not only the chance to incidentally tackle cultural issues when adopting measures not directly related to the cultural field, but also to adopt harmonising legislation with a more pronounced cultural nature – otherwise precluded by Art.167(5)[224] – always given, however, the need to find a solid

prioritisation of the interests they aim at protecting, at the same time it shall be always borne in mind that, as recalled by AG Jacobs in case C-379/98 addressing the environmental mainstreaming provision, the latter "is not merely programmatic; it imposes legal obligation".

221 This new status conferred to particular sectorial considerations seems to be also following a trend emerging from the Commission's reports on competition policy: for example, in the XXIIIrd report drafted in 1993, in the aftermath of the Maastricht Treaty, the Commission clearly affirmed that "Competition policy is an instrument which complements the Community's other policies. This chapter of the Report therefore looks at the role which competition policy can play in the implementation of such other policies" (at 87).

222 According to PSYCHOGIOPOULOU, E., *The Integration of Cultural Consideration in EU Law and Policies*, the cultural mainstreaming clause "does not even oblige the Community to accommodate cultural concerns whenever they are raised", on the contrary allowing to ignore cultural issues potentially emerging.

223 This point is made by DE WITTE, B., in its *Conclusions* to IPPOLITO, F., BARTOLONI, M.E., CONDINANZI, M. (Ed.), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, London, Routledge, 2014, at 183.

224 This is also the perspective adopted by PSYCHOGIOPOULOU, E., cit. at 73, according to whom "not only does Article 151(4) EC enable the introduction of measures incidentally pursuing cultural objectives; it also permits the adoption of harmonizing legislation primarily intended to attain cultural policy goals. The limit on the incorporation of cultural considerations in Community harmonizing legislation depends on the ability of the European institutions to establish an acceptable link between the measure concerned and the Treaty article serving as its legal foundation". More specifically, the Author, focusing on conflicts between legal bases for the

connection between the measure enacted and its primary legal basis (of course, other than Art.167). Indeed, bearing in mind the overall structure of Art.167, it would be at any rate impossible to use the integration clause established by its fourth paragraph to circumvent the harmonisation prohibition enshrined in its fifth paragraph, also in line with the orientation of the CJEU which – in addressing the ban on harmonisation in the health sector – affirmed that "other articles of the Treaty may not, however, be used as a legal basis in order to circumvent the express exclusion of harmonisation"[225]. In any case, the divide between measures genuinely meant for example to ensure the well-functioning of the market but at the same time characterized by a marked cultural component on the one hand, and measures surreptitiously relying on an internal market related legal basis purely to sidestep the harmonisation prohibition on the other, seems to be at times rather blurred, just as like the boundaries to the Union competence, an issue particularly complex which seems to underpin the whole discussion on the legal basis to use when adopting cultural policy measures[226].

2.1 The European Media Freedom Act: an indirect harmonisation through policies integration?

In consideration of the twofold nature which characterises the cultural sector, especially if cultural industries are examined, employing for example Art. 114 – namely the so-called internal market clause – in order to address the latter, represents a concrete instrument at the EU disposal. This clearly emerges for example in the context of the recent aforementioned proposal for a *European Media Freedom Act* (EMFA), drafted from the Commission, where the appropriateness of the reference to Art. 114 as legal basis– the relevance of which was also recalled by the Regulatory Scrutiny Board after the first draft of the EMFA[227] – is expressly tackled by the

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adoption of measures targeting cultural goals, underlines the difference between cases in which both the bases preclude or allow harmonisation and cases in which, on the contrary, their integration techniques differ one from the other. In the first case, the so-called centre of gravity doctrine, developed in the case C-155/91 *Commission v. Council (Waste Directive)* [1993], ECLI:EU:C:1993:98 – according to which, when the Union adopts an act with a twofold objective, being one of these predominant and the other ancillary, the legal basis for the act itself must be only one, and more specifically the one related to the predominant purpose – will apply, while in the second case it will not, allowing the adoption of harmonising measures mainly aiming at achieving cultural policy related goals.

[225] See case C-376/98 *Germany v. Parliament and Council* [2000], ECLI:EU:C:2000:544.

[226] See e.g. DE BÚRCA, G., *Reappraising Subsidiarity's Significance after Amsterdam*, 1999, *Harvard Jean Monnet Working Paper* 7/99, who underlines the fluidity of EU multilevel governance and the consequent complexity arising when distinguishing national and European competences.

[227] Indeed, in the first opinion given by the Board (Regulatory Scrutiny Board Opinion, European Media Freedom Act, SEC(2022)322 final), at 8, it was pointed out that "The report should also identify the precise regulatory gaps that the initiative aims to fill, better explaining the shortcomings of the existing regulatory measures applicable to the media markets. It should further develop and

Commission[228]. Moreover, the same proposal can be considered also paradigmatic of the potential criticalities arising from the close connection between internal market related and cultural goals and impacting on the already complex allocation of competences between Union and Member States in the media sector[229], also in the light of the content of the Protocol no.29 (the so-called "Amsterdam Protocol"), according to which it shall be up to MS to regulate and finance public service media at the national level[230]: indeed, many Member States expressed an interest to better understand the reasons behind the resort to Art. 114 and, more specifically, the connection between the well-functioning of the internal market and the content of the Proposal itself[231], also questioning the respect of the subsidiarity principle by the

substantiate with clear evidence the problem of fragmentation of the single media markets, and the resulting effects on the media market players and media pluralism. It should better explain the different interpretations of regulatory concepts by different national regulators. The analysis should underpin the choice of Article 114 as legal base and better support the respect of the subsidiarity principle in view of the diverse cultural, historical and political traditions of the media frameworks in the Member States. The report should clarify the definition, practical interpretation and measurement of the notion of media pluralism. Given the legal base the report should review the (general) policy objectives and better explain their linkages as well as the interplay between the objective of pursuing well-functioning single media markets and its link to promoting and ensuring media pluralism in the Member States. It should be clearer upfront on the balance and relative importance of further EU-level coordination versus new substantive harmonisation measures".

228 See the Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, 2022/0277(COD), at 7-8.

229 See e.g. COLE, M.D., UKROW, J., ETTELDORF, C., *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, Baden Baden, Nomos, 2021.

230 Protocol annexed to the Treaty of the European Community, OJ C 340, 10.11.1997, according to which "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".

231 See for example the concerns expressed in the Netherlands by the GreenLeft and Labour parliamentary parties, emerging from the letter to the Commission signed on 18 April 2023 by the chair of the Dutch standing committee for Education, Culture and Science, available here: ("In the opinion of the members of the GreenLeft and Labour parliamentary parties, it is debatable whether Article 114 provides a sufficient legal basis. This is because the judgment in question merely establishes that there is an internal market, not that there are barriers and that these barriers are removed. Does the Commission consider that intervention in the internal media market is justified only if there are barriers that create serious distortions of competition and if these are removed by the intervention? Would it please explain in more detail what barriers that cause serious distortions of competition will be removed by this Act?").

Union[232] and at times casting doubt on the suitability of Art.114 to address pluralism issues[233].

Remarkably, Art.167 is not explicitly recalled by the Commission, nonetheless it seems to be the stone guest in Recital 2, where to overcome the possible tensions between the cultural goal and the economic one – namely the one related to the well-functioning of the internal market – a connection is traced between them, establishing an instrumental relationship between the cultural and the economic dimension[234], to then affirm that the Union – in the light of the undeniable changes which have been affecting the market, making it increasingly digital and international – "should help the media sector seize those opportunities within the internal market, while at the same time protecting the values, such as the protection of the fundamental rights, that are common to the Union and to its Member States". In a way, the relationship between internal market and cultural concerns – being the latter something which generally has to be taken into account in EU action thanks to Art.167(4) but again, in very general and vague terms – seems here to change, becoming culture-related considerations some kind of "picklock" used by the Commission to extend its powers to sector in which its competences would be otherwise limited. Interestingly, Art. 167 is on the contrary explicitly cited in the 2023 Council's mandate for negotiations with the Parliament on the EMFA proposal[235], and the main reason beyond the choice to recall this provision seems to be directly related to the need to respect MS competence in the media field: in fact,

[232] The respect of the subsidiarity principle is tackled e.g. in the Danish reasoned opinion delivered on 9 December 2022 and available here: more specifically, according to the majority of the *Folketinged*, the proposal would violate the Amsterdam Protocol (Protocol no. 29 annexed to the TEU, according to which "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".

[233] See for example the perspective adopted by the German Bundesrat (*Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates zur Schaffung eines gemeinsamen Rahmens für Mediendienste im Binnenmarkt und zur Änderung der Richtlinie 2010/13/EU, Ratsdok 12413/22*), which, at 7, affirms that the resort to the internal market competence enshrined in Art.114 – together with a purely economic consideration of the media sector – would even endanger regional and local media diversity ("*Es ist daher vielmehr zu befürchten, dass durch einen solchen EU-einheitlichen Maßstab aufgrund der ausschließlich herangezogenen Binnenmarktkompetenz nach Artikel 114 AEUV sowie eine rein wirtschaftliche Betrachtung der Medien und ihrer Akteure (mittelbar) die regionale und lokale Medienvielfalt sogar gefährdet würde*").

[234] As also noted by ETTELDORF, C., cit. More specifically, in Recital 2 it is affirmed that "Given their unique role, the protection of media freedom and pluralism is an essential feature of a well-functioning internal market for media services".

[235] Council of the European Union, Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market and amending Directive 2010/13/EU – Mandate for negotiations with the European Parliament.

after having reaffirmed the need to "harmonise certain aspects of national rules related to media services", the Council underlines that in this harmonisation process it is however necessary to take into account exactly Art.167, "which reaffirms the importance of respecting the national and regional diversity of the Member States"[236]. Moreover, the fact that this provision – at least in the proposal's version amended by the Council – is only used to remind of the need to respect MS diversity, being on the other hand completely absent in the first Commission's version, might be also considered at hinting that cultural considerations can be *de facto* integrated in the European action even if a specific provision allowing it is failing[237]; therefore – on a more general level – it might be useful nowadays not only to formalise the need to take sector-specific consideration in the EU overall action but also to distinguish – even if they are often tightly intertwined – economic concerns from cultural ones, so that the latter are not surreptitiously used to circumvent the rules on the allocation of competences between Union and MS. Also, that would seem more consistent with the overall ratio of Art.167(4), the introduction of which at any rate affected the existing EU competences in the cultural field[238] on the contrary "merely" requesting the Union to take cultural[239] considerations into account and to balance them with other regulatory interests.

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[236] *Ibid.*, at 8.

[237] More in general, on this point see DE WITTE, B., cit., according to whom, as also emerging from the practice of EU institutions, "the integration clauses are not strictly needed to allow for cross-cutting policies that pursue a set of different objectives", and that because of the broad nature of the objectives established by Art.3 TEU, applying to all EU activity.

[238] As underlined for example by LENSKI, S., *Öffentliches Kulturrecht*, Tübingen, Mohr Siebeck, 2013, at 142.

[239] On this point see also the case T-391/17, *Romania v. Commission* [2019], regarding an European Citizens' initiative on national and linguistic minorities' protection and cultural and linguistic diversity's strengthening, notified to the Commission for registration. Here the General Court highlighted the connection between Art.167(4) and Art.3(3) TEU – according to which the European Union must respect its rich cultural and linguistic diversity – to then specify that the Commission, in adopting a decision on the proposes citizens' initiative, did not concede that "the European Union has general competence to legislate in the field of the protection of the rights of persons belonging to national minorities, but only that respect for the rights of minorities and the strengthening of cultural and linguistic diversity, as values and objectives of the European Union, must be taken into account in EU actions in the areas covered by the proposed ECI", later also pointing out that "while, in the areas for which the European Union is competent, the Commission is entitled to submit, for the purpose of achieving the objectives specifically pursued by the relevant provisions of the FEU Treaty, proposals for legal acts which take account of the values and objectives which form the subject matter of the proposed ECI, nothing must prevent that institution, as a matter of principle, from submitting proposals for specific acts which, as in the present case, are deemed to supplement EU action in the areas for which it is competent in order to ensure respect for the values set out in Article 2 TEU and the rich cultural and linguistic diversity laid down in the fourth subparagraph of Article 3(3) TEU". What can be inferred from this passage is that, even in absence of a provision such as Art.167(4), cultural diversity (as already underlined) can be considered as a value pervading the European framework and therefore as an element to be however integrated in European action, also through proposal for specific acts and not only incidentally, if needed to "supplement" EU action in fields in which the latter it is competent.

3. The goal(s) of competition law and the room for non-economic considerations

The issue of the relevance to be acknowledged to policy-linking clauses can be also linked – for the purposes of this work – to the long-standing debate on competition policy's goals. Indeed, the latter – characterised by very general rules and therefore open to a wide range of different interpretations[240] – might represent a flexible instrument to pursue broad public interest goals, and that also because of the "sponge-like" features of competition law[241]. The high degree of abstractness characterising the latter makes even more complex the attempt to identify its goal(s)[242], ranging from more traditional aims such as efficiency[243], consumer welfare[244] and economic freedom[245], to more modern ones, such as fairness[246], even though a tendency to recognise multiple goals can be also often detected[247]: the

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This perspective was also shared on appeal by the CJEU in C-899/19 P [2022]: more specifically, the Court affirmed that the General Court, without unduly broadening the competences of the EU, plainly affirmed that – always given the need to provide a solid legal basis – the acts adopted by the Union can be also directed towards the protection of Union values, such as cultural and linguistic diversity.

240 As also noted by DUNNE, N., *Public Interest and EU Competition Law*, in *The Antitrust* Bulletin, vol. 65, issue 2, 256-281, according to whom the competition rules can be considered "comparatively wide-ranging and amorphous; if not exactly a "blank cheque" for enforcers, then certainly amenable to progressive development and reinterpretation in light of changing market circumstances". The Author sheds light also on the fact that competition rules can be enforced by the Commission alone, without Parliament's and Council's approval, meaning that it can prove to be "a more effective tool by which to address contentious issues that may struggle to reach the level of consensus required for direct legislative intervention".

241 This expression is used by EZRACHI, A., *Sponge*, in *Journal of Antitrust Enforcement*, 2017, issue 5, 49-75, according to whom this characteristic makes competition law "inherently pre-disposed to a wide range of values and consideration. Its true scope and nature are not 'pure' nor a 'given' of a consistent objective reality, but rather a complex and, at times, inconsistent expression of many values".

242 For a recent detailed overview of the goals attributed to competition policy see STYLIANOU, K., IACOVIDES, M., *The goals of EU competition law: a comprehensive empirical investigation*, in *Legal Studies*, 2022, 1-29.

243 See for example ODUDU, O., *The wider concerns of competition law*, in *Oxford Journal of Legal Studies*, 2010, vol. 30, no. 3, 599-613.

244 See for example BORK, R.H., *The Antitrust Paradox: A Policy at War with Itself,* 1978.

245 This is for example adopted among others by MONTI, G., *EC Competition Law*, 2007, who also acknowledges however a shift towards economic efficiency and consumer welfare – and more in general from ordoliberalism to the neoclassical model – in European competition law.

246 Indeed, as underlined among others by GERARD, D., *Fairness in EU Competition Policy: Significance and Implications*, in *Journal of European Competition Law & Practice*, 2018, vol.9, no.4, the rise of the concept of fairness can be traced back to the appointment of Margrethe Vestager as Commissioner for competition in 2014, as for example emerging from her opening address, when she underlined how "fairness is about one of the most fundamental questions in our work".

247 WAKED, D., *Antitrust as public interest law: redistribution, equity, and social justice*, in *The Antitrust Bulletin*, 2020, points out for example the need to connect the welfare goal of antitrust with other

conflicts potentially arising from the coexistence of extremely varied aims, however, appear more manageable if the aforementioned distinction between ultimate and intermediate goals – to be maintained distinct in order not to burden antitrust with an excessive varied range of aims[248] – is recalled.

In any case, it appears worth underlining how the choice of one or another goal in the practical enforcement of competition rules seems to be inevitably bound to change depending on external factors, such as the economic situation[249], also given the need for competition policy to be responsive to changes, as shown for example by the 2020 Commission's proposal for a New Competition Tool[250] - aiming at making sure that "competition policy and rules are fit for the modern economy"[251] – later abandoned in favour of the Digital Markets Act[252].

This ever-changing nature of competition law – as it has been underlined[253] – might be considered as linked to the latter being a public policy tool, even though the extent to which non properly competition-related considerations[254] should be integrated in competition enforcement has been largely discussed[255]. Of course, the kind of approach to this issue will likely depend on the perspective adopted with regard to competition law's goals: indeed, a focus mainly on proper competition-related aims might result in a tendency not to include broader public policy elements into account, at times also suggesting that such an operation would result in an unduly use of competition as a "Trojan horse" to indirectly achieve non-competition

public-interest oriented aims, such as equity and redistribution, in order to give back to consumers part of the wealth generated through competition itself, in this way attributing a double nature to the latter.

248 As also recalled by Alexander Schaub (former Director General for Competition of the European Commission) in the debate on competition goals reported in C.D. EHLERMANN, L.L. LAUDATI (Ed.), *European Competition Law Annual 1997: Objectives of Competition Policy*, Oxford, Hart, 1998, at 9, according to whom "The two categories should not be mixed up. If we did, antitrust policy would be burdened with too long list of objectives".

249 This is the point made by GERADIN, D., LAYNE-FARRAR, A., PETIT, N., *EU Competition Law and Economics*, Oxford, Oxford University Press, 2012, at 23, where the Authors note that "one should not lose sight of the fact that EU competition law is primarily a public policy tool. As with tax policy, the emphasis placed on one or the other objective (fairness, freedom, efficiency, consumer welfare) may fluctuate over time, and be influenced by external factors, such as changes in the overall economic situation, political background of the competition commissioner, etc.".

250 See the Commission's Inception Impact Assessment Ares(2020)2877634, 04.06.2020.

251 *Ibid.*, Section A.

252 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 *on contestable and fair markets in the digital sector*, OJ L 265, 12.10.2022, 1 ff.

253 GERADIN, D. *et al.*, cit.

254 Some Authors define these considerations as public-interest ones (see for example DUNNE, N., cit.), as non-market ones (see for example DE WITTE, B., *Non-market values in internal market legislation*, in SHUIBHNE, N.N. (ed.), *Regulating the Internal Market*, Cheltenham, Edward Elgar, 2006, 61-86) public policies related ones (see for example MONTI, G., *Article 81 EC and public policy*, in Common Market Law Review, 2002)

255 See for example SCHWEITZER, H., *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81*, in *EUI Working Papers*, LAW 2007/30.

goals[256], also conferring a direct effect to the policy-linking clauses relied upon to pursue them[257]. With specific regard to the issue of balancing in anticompetitive agreements, also the Commission – which already in 1999 pointed out that the aim of Art.101(3) TFEU was "to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations"[258] – in the 2004 Guidelines on the application of Art.81(3), now Art.101(3)[259], offered a rather restrictive solution to this issue, by admitting the possibility to take into account goals pursued by other Treaty provisions "to the extent that they can be subsumed under the four conditions of Article 81(3)"[260].

However, leaving in the background the possibility of considering non-competition interests as proper goals of competition law, it seems at any rate undeniable that those interests may justify exemptions from the application of the latter, or at least require some kind of balancing, also in the light of the existence of the policy-linking clauses[261]. Some criticalities might nevertheless arise when to be

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[256] See for example ODUDU, O., *The Boundaries of EC Competition Law*, cit. More specifically, according to the Author, criticising TOWNLEY, C., *Article 81 EC and Public Policy*, Oxford, Hart, 2009, "The uncontested legitimacy of competition law was used as a Trojan horse to achieve non-efficiency (and on the thesis advanced, non-competition) aims indirectly" (at 167).

[257] *Ibid.* Again, according to the Author, the policy-linking clauses are incapable of producing a direct effect, therefore, "if a provision is incapable of direct effect, it is inappropriate to use another provision to indirectly create those same rights and obligations".

[258] See European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 96 of the EC Treaty*, Commission Programme No. 99/027, 28.04.1999.

[259] See European Commission, Communication from the Commission – *Guidelines on the application of Article 81(3) of the Treaty*, OJ C 101, 27.04.2004, 97 ff.

[260] According to SEMMELMANN, C., *The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC*, in *Global Antitrust Review*, 2008, issue 1, 15-47, these guidelines "introduced a full-blown *efficiency defence*". Moreover, it seems worth underlining that in the first version of the Guidelines, the Commission also stated: "It is not, on the other hand, the role of Article 81 and the authorities enforcing this Treaty provision to allow undertakings to restrict competition in pursuit of general interest aims". This sentence, however, which seems to be in line with the *White Paper on Modernisation* issued in 1999, is no longer present in the final version of the document.

[261] Indeed, as recalled by the CJEU already in the 1970s, the Commission is entitled to reconcile competition goals with non-competition ones. As affirmed in case C-26/76*, Metro v. Commission* [1975], ECLI:EU:C:1977:167, "The powers conferred upon the Commission under Article 81(3) [now Art.101(3) TFEU] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end, certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market". Similarly, in the joined cases T-538/93, 542/93 and 546/93, *Métropole Télévision v. Commission* [1996] ECLI:EU:T:2002:242, the Court affirmed that "in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty [now Article 101(3) TFEU]".
This distinction between considering non-economic objectives as competition law's goals and using them as mere grounds for exemption from the application of the latter is underlined by SAUTER, W., *Coherence in EU Competition Law*, Oxford, Oxford University Press, 2016, at 70. The same Author also draws a divide between objectives of EU public policies and of national public policies, pointing

protected or promoted through exclusion or balancing exercise is a national and not a European interest[262]. More specifically, when dealing for example with cultural policies – even though the Commission, in the aftermath of the Maastricht Treaty, explicitly acknowledged its duty to take cultural considerations into account when applying competition law[263] – the fact that a national interest is at stake might be problematic, especially in the light of the specific features of Art. 167 TFEU: as it has been argued[264], the prohibition of any harmonisation and the merely supporting role of the Union in the cultural sector might indeed lead to consider the policy-linking clause enshrined in Art.167(4) as a "*renvoi* to national culture"[265], therefore making difficult, for example in the case of anticompetitive agreements, to take into account national interests (not explicitly recalled by Art.101 TFEU) when granting an exemption to an agreement[266]. However, as explicitly acknowledged in the state aid discipline by the General Block Exempt Regulation[267], the reference to national cultures does not prevent Art.167 from recognising "the importance of promoting culture for the Union and its Member States"[268] and from placing on the Union a duty to take cultural aspects into account, without drawing a clear-cut distinction between the national of the European nature of the latter.

3.1 The tensions between national and European cultural interests: an obstacle to the integration of cultural considerations?

This issue might also seem to be related to the lack of a proper definition of the "cultural heritage of European significance" in Art.167. Although this expression can be considered as representing an attempt to broaden up the notion of cultural heritage, loosening the bound with the single nations in order to create a "shared" heritage[269] , the blurred boundaries of it can be regarded – as anticipated – as a proof

out how, in order to safeguard the coherence of EU competition law, goals set at the MS level cannot constitute objectives of the latter.

262 With specific regard to anticompetitive agreements, see MONTI, G., *Article 81 EC and Public Policy*, in *Common Market Law Review*, 2002, vol.39, issue 5, 1057-1099.

263 See the Written Question No. 773/98 by Jessica Larive to the Commission. Book price agreements and Article 128 of the Maastricht Treaty, OJ C 013, 18.01.1999, 8, where it was also underlined how the Commission was already including cultural considerations in its analysis, even before the introduction of Art.167 TFEU.

264 See SCHMID, C.U., *Diagonal competence conflicts between European Competition law and national regulation – A conflict of laws reconstruction of the dispute on book price fixing*, in *European Review of Private Law*, 2000, 8, issue 1, 155-162, at 164.

265 *Ibid.*, at 164.

266 Again, this point is made by MONTI, G., *Article 81 EC and Public Policy*, cit.

267 Regulation (EU) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.06.2014, 1 ff.

268 *Ibid.*, at 13.

269 See CHITI, M.P., *Beni culturali*, in *Trattato di diritto amministrativo europeo*, Milano, Giuffrè, 1997, 349-381.

of the long-standing tension between the need to safeguard and promote MS' cultural diversity on the one hand and the willingness to create a common European identity – not replacing but coexisting together with the national ones – on the other hand. Indeed, this friction might be considered at least as one of the factors leading to the choice not to clarify the concept of cultural heritage of European significance, choice which also seems to be coherent with the wide margin of discretion granted to Member States in defining what can be considered as cultural heritage[270].

However, the distinction to be drawn between national and European cultural heritage notwithstanding[271], the two different levels of action seem to be complementary to each other[272], also in the light of the fact that, in spite of the lack of clarity of shared heritage, national cultures can be considered as going beyond the purely national dimension and contributing to the latter. This was for example also underlined, with regard to state aid discipline, by the Commission, which, in examining the compatibility with the Internal Market of an Austrian aid scheme in favour of federal museums, underlined how "the conservation of cultural heritage is a recognised area of *mutual benefit for all European citizens* under Art. 151 EC [now Art.167 TFEU]"[273], also pointing out how the museums' task could be considered as aiming at "promoting and making accessible to the public national *but also European and worldwide* cultural heritage"[274]. For these reasons, even though the uniformity in the enforcement of competition law should be preserved, the perspective according to which Art.167(4), in the light of the reference to national cultural interests, might not be sufficient to exempt an agreement from the application of competition law, might be problematic, given that the safeguard of the European cultural heritage appears to be closely intertwined with the protection of the national ones.

3.2 EU Institutions and the lack of a proper notion of culture and cultural heritage (deferment)

[270] For example, in the Communication from the Commission on State aid for films and other audiovisual works (OJ C 332, 15.11.2013, 1 ff.), where it is explicitly stated that: "In line with the subsidiarity principle enshrined in Article 5 TEU, the definition of cultural activities is primarily a responsibility of the Member States. In assessing an audiovisual support scheme, the Commission acknowledges that its task is limited to verifying whether a Member State has a relevant, effective verification mechanism in place able to avoid manifest error". The concrete degree of autonomy left to Member States will be examined in the third chapter of the present work.
[271] This difference is emerging for example also from the aforementioned Art. 3(3) TEU, providing that the Union shall, at the same time, ensure that Europe's cultural heritage is safeguarded and enhanced and respect the European cultural and linguistic diversity.
[272] See for example PEZET, F., *Promoting culture while implementing the Internal Market – Member States' cultural policies between freedom and constraints*, in *Rivista trimestrale di diritto tributario*, 2020, issue 1, 101-119.
[273] See State aid NN50/2007 – Austria, *Indemnity scheme for federal museums*. The same point is also made in State aid N123/2005 – Hungary, Cultural Heritage Scheme to Promote Tourism.
[274] See the press conference released on 24 February 2010 available here.

Nevertheless, European institutions – in spite of the lack of definition of culture and cultural heritage – addressed the need to avoid an unduly broad notion of them, and that in order to prevent Member States from adopting purely protectionist measures by relying on Art.167.
Even though this issue will be dealt with in greater detail in the third chapter, it seems relevant to briefly recall as of right now the tendency, shown by both the Commission and the Court of Justice, to draw at times a distinction between proper cultural goals and cultural-industrial ones, granting exemptions from state aid discipline based on the aforementioned Art.107(3)(d) only when culture in its "essentially symbolic sense"[275] appears to be at stake[276]. However, distinguishing these two different aims might be rather difficult: indeed, they often appear to be tightly intertwined, and the industrial component might then end up absorbing the cultural one, leading to the choice of a legal basis for exemption other than the cultural derogation. This emerges for example from the exam of a case on the promotion of dubbing and subtitling of movies in Basque dating back to 2008: here the Commission underlined how a measure adopted by Spain and aiming at promoting the use of the Basque language was also supporting a commercial activity, subject to international competition, therefore its compatibility with the internal market should have been evaluated on the basis of the industrial derogation established by Art.107(3)(c), even though, interestingly, Art.167 was explicitly taken into account in the compatibility assessment, more specifically when the cultural aim of the measure was considered as a common interest objective to be balanced with the need to safeguard the internal market[277].

4. The EU's position within WTO and UNESCO: from cultural exception to cultural diversity

As indirectly anticipated when addressing the room for non-economic considerations in competition law, the approach towards cultural considerations can

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[275] In these terms CRAUFURD SMITH, R., *The evolution of cultural policy in the European Union*, in CRAIG, P., DE BÚRCA, G. (eds), *The evolution of EU law*, cit. According to the Author, this conception of culture can be regarded as similar to the definition of 'cultural content' enshrined in Art.4(2) of the 2005 UNESCO Convention on Cultural Diversity, according to which the latter can be described as the "symbolic meaning, artistic dimension and cultural valued that originate from or express cultural identities".
[276] See for example, with regard to the CJEU's jurisprudence, the aforementioned Case 17/92, *Federación de Distribuidores Cinematográficos v. Estado Español et Unión de Productores de Cine y Televisión*, where the Court found discriminatory Spanish measures promoting the distribution of national films not justifiable on cultural policy grounds, also in the light of the fact that these measures were not taking into account the content or quality of the films, in this way indirectly introducing some kind of implicit "cultural test".
[277] State aid N192/2008 – Spain*, Promotion of dubbing and subtitling of movies in Basque.*

be twofold: indeed, the latter can be either excluded from the scope of competition law or balanced with economic interests. When dealing with the more general issue of the relationship between culture and trade, the approach to follow is similar, in the light of the need both to protect the specificities of cultural products and activities through *ad hoc* exemptions and to promote cultural considerations in a "positive" and not "negative" way: this topic – whose detailed analysis remains outside of the scope of this work – will be here briefly address, mainly in order to show the EU's approach to the issue at the international level. More specifically, attention will be paid to the cultural exception in the forum of the World Trade Organisation (WTO) and to the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The international scenario will likely prove to be instructive also in order to show once more the shift from a tendency to address the potential conflicts between culture and trade through exemptions to a more frequent use of integration clauses, meant to ensure a combined consideration of these two elements[278].

4.1 WTO and cultural products and activities: a balance in a vacuum?

As it has been underlined[279], at the international level cultural concerns are to be framed within the broader debate on the so-called "trade linkage", which – similarly to the debate on the need to integrate non-economic considerations in competition law – is concerned with the achievement of a balance between free trade and social values[280] within the framework of WTO rules.

The conflict between these two potentially opposing interests is directly related to the aforementioned dual nature of cultural goods and services and is consequently mirrored, at the political level, by the contrast between countries highlighting either their cultural or commercial component. The European Union can be considered as falling within the first category, in the light of the tendency, shown both within the WTO and in recent regional and bilateral agreements[281], to consider the audio-visual and other cultural sector as characterised by distinctive not-economic features and therefore to be excluded from liberalisation commitments undertaken at the international level.

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[278] On this shift see NEUWIRTH, R.J., *The Future of the 'Culture and Trade Debate': a Legal Outlook*, in *Journal of World Trade*, vol. 47, issue 2, 2013, 391-419.
[279] See DE WITTE, B., *Trade in Culture: International Legal Regimes and EU Constitutional Values*, in DE BURCA G., SCOTT J. (eds), *The EU and the WTO: Legal and Constitutional Aspects*, Oxford, Hart, 2001, 237 ff., at 237.
[280] On trade linkages and culture see for example CHASE, K.A., *Trade and Culture*, in *Oxford Research Encyclopedia of Politics*, 2019, 1-26.
[281] For an extensive analysis of the more recent EU's position at the international level see RICHIERI HANANIA, L., *Trade, culture and the European Union cultural exception*, in *International Journal of Cultural Policy*, 2019, vol. 25, no. 5, 568-581.

This approach – diametrically opposed to the one followed by the U.S., showing the willingness to open markets in cultural sectors – prevailed in the 1940s, when the General Agreement on Tariffs and Trade (GATT) was signed.
Indeed, in contrast to the overall aim of the agreement, intending to remove barriers to trade and to eliminate discriminatory treatment in international commerce, its Article IV introduced a special regime for the audiovisual sector, exempting cinematograph films – under certain conditions – from the general prohibition of quantitative restrictions. More specifically, contracting parties to set or to maintain "internal quantitative regulations relating to exposed cinematograph films", regulations which "shall take the form of screen quotas", therefore reserving screen time for films of national origin. The same logic of exemptions – according to which a balance between culture and trade can be only found by drawing a thick line between them[282] – can be detected in Article XX GATT, which, among the general exceptions allowing the contracting parties to adopt GATT-inconsistent measures in order to achieve specific policy objectives[283], provides a derogatory regime also for measures "imposed for the protection of national treasures of artistic, historic or archaeological value".

Far from being solved, the tensions between trade and culture once more emerged during the Uruguay round, namely the most relevant GATT round of multilateral negotiations which then led to the creation of WTO. A new compromise between the two aforementioned diametrically opposed approaches was in this context found: particularly, the concerns expressed by negotiating parties such as Canada and EU with regard to the liberalisation of the audiovisual sector were addressed not only through *ad hoc* exemptions to the most-favoured-nation treatment – namely the principle of not discriminating foreign trading partners – but also through some countries' decision not to undertake liberalisation commitments in this sector and in related ones[284]. In any case, no proper cultural exception – at least as conceived by the EU and Canada, was introduced. Indeed, before the Marrakesh Agreement – which established the WTO – the EU and the U.S. simply "agreed to disagree" on the treatment of cultural products, without providing a satisfactory solution mediating between the two different perspectives: this "mere

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[282] As underlined by JACKSON, J.H., *World Trade and the Law of GATT*, 1969, at 293, the reason behind Art. IV itself should be identified with the tendency to consider audiovisual sector's regulation as "more related to domestic cultural policies than to economics and trade".
[283] In particular, always given the need to avoid arbitrary or unjustifiable discrimination between countries or disguised restrictions on international trade, art. XX enables contracting parties to adopt measures aiming at achieving various domestic policy goals, such as for example the protection of public morals, the conservation of exhaustible natural resources, the protection of human, animal or plant life or health.
[284] This was possible because WTO members' commitments under the General Agreement on Trade in Services (GATS) have to be undertaken through positive lists of commitments, allowing contracting parties to opt out of liberalisation obligations.

ceasefire[285]", avoiding to directly address the issue, still represents one of the causes of the great difficulties faced at the international level in overcoming the trade-culture dilemma.

However, leaving this lack of a systematic approach in the background, even the introduction of *ad hoc* exemptions and the decision not to undertake liberalisation commitments in specific cases proved to be not entirely satisfactory, and that for a twofold reason.

First of all, the decision to opt out of liberalisation commitments in the audiovisual field and in related ones was not always matched by similar decisions in other culturally sensitive sectors, as in the case of printing and publishing services[286]: that can be considered as revealing the contracting parties' perspective on the different degree of vulnerability and the different contribution to cultural diversity characterising the audiovisual and other cultural sectors and, from a more practical perspective, might also impact on the possibility of effectively safeguard cultural diversity itself in international trade law, if a broad notion of culture (such as the one which seems to emerge at the European level[287]) is accepted.

Secondly, the cultural concerns kept on being considered as having a marginal relevance, as shown both by many of the exemptions to the most-favoured-nation treatment – making only accidental references to properly cultural objectives and on the contrary focusing mainly on the link between these exemptions and the need to "ensure effective market access"– and by a significative case dating back to 1997, concerning measures adopted by the Canadian government to support the domestic magazine industry which were found to be in violation of GATT rules by the WTO[288]. What appears interesting to point out is that in this case the WTO did not seem to wholly grasp the dual nature of cultural products and activities – on the contrary stressed by the Canadian government – choosing to overlook their specificities[289] and to focus mainly on their commercial component and ignoring the

[285] This is the expression used by BURRI, M., *Trade versus Culture: The Policy of Cultural Exception and the WTO*, in DONDERS, K., PAUWELS, C., LOISEN, J., *The Palgrave Handbook of European Media Policy*, cit, 479-492, at 485.

[286] See WTO, European Communities and Their Member States – Schedule of Specific Commitments. General Agreement on Trade in Services, GATS/SC/31, 15.04.1994.

[287] See for example the already recalled Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world, COM/2007/0242 final, where it is stated that "'Culture'[…] can refer to fine arts, including a variety of works of art, cultural goods and services. 'Culture' also has an anthropological meaning. It is the basis for a symbolic world of meanings, beliefs, values, traditions which are expressed in language, art, religion and myths.

[288] WTO Panel Report, *Canada – Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/R, 14.03.1997, WTO Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R, 30.06.1997.

[289] This is particularly clear in the classification, made by the Appellate Body, of Canadian magazines and U.S. split-runs as "directly competitive or substitutable" products.

more intangible and symbolic one[290], even if the possibility for the contracting parties to safeguard their cultural identity was not *a priori* excluded. Indeed, the WTO Panel, when concluding its decision, explicitly affirmed that "the ability of any Member to take measures to protect its cultural identity was not at issue in the present case"[291], indirectly leaving the door open to different measures with the same objective.

4.2 The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

In the aftermath of the Canadian case, when the inadequacy of the WTO framework started to more clearly surface, also in order to concretely provide instruments capable of protecting national cultural identities (something which, as just clarified, was not precluded by the WTO), the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions[292] (CDCE), adopted in 2005, was welcomed as a potential counterbalance to the WTO, because of its attempt to reaffirm the governments' right to adopt and implement measures to protect and promote cultural diversity and also by virtue of its being virtually capable of solving the conflict between culture and trade[293].

Indeed, drawing from the multifaceted nature of cultural products and activities[294], the Convention tried to make a step further the logic of exception, to embrace a more holistic approach, not only placing relevance on the need to grant

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[290] This is also pointed out by KNIGHT, T., *The Dual Nature of Cultural Products: An Analysis of the World Trade Organisation's Decision Regarding Canadian Periodicals*, in *University of Toronto Faculty of Law Review*, 1999, vol. 57, issue 2.

[291] WTO Panel Report, at para 5.45.

[292] The need to protect cultural diversity, recognised as a proper right directly related to human dignity, was already addressed by the UNESCO in the 2001 Universal Declaration on Cultural Diversity

[293] See Art. 5 CDCE, according to which "The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention". Art. 4(6) provides a very broad definition of cultural policies and measures, by affirming that this expression refers to "those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and service". Indeed, cultural policies and measures can take several forms (e.g. imports' quantitative restrictions, restrictions to the access to the national market). For a comprehensive view see GRABER, C.B., FOOTER, M.E., *Trade Liberalisation and Cultural Policy*, in *Journal of International Economic Law*, 2000, vol. 3, issue 1, 115-144.

[294] See the CDCE's Preamble, where it is affirmed that "cultural activities, goods and services have both an economic and cultural nature, because they convey identities, values and meanings, and must therefore not be treated solely having commercial value".

a differential treatment to them but also underlining the complementarity of the commercial and the cultural component[295].

Indeed, even though the choice to negotiate such an instrument outside the WTO and under the auspices of UNESCO – namely an international actor traditionally dealing with cultural concerns – might seem as once more suggesting a clear-cut division between the trade and the culture realms, it can also be detected – within the CDCE itself – a shift from a negative approach, based on exceptions, to a positive one, focusing on the compenetration between the two different components of cultural products and activities[296]. This also emerges from Art. 20 of the Convention, concerning its relationship to other treaties (including international trade ones). While the first version of this provision seemed to imply a mutual exclusion between these two different instruments, admitting some kind of rapprochement only in the second paragraph[297], its final version, in its first paragraph, seems to be now more attentive to the need to ensure coordination between the CDCE and trade agreements: indeed, according to it, the Parties, in the light of their duty to perform in good faith their obligation under the Convention and "all other treaties to which they are parties", shall, "without subordinating the CDCE to any other treaty", "foster mutual supportiveness" between them and "take into account the relevant provisions" of the CDCE itself "when interpreting and applying the other treaties to which they are parties or when entering into other international obligations". At the same time, from a more practical perspective, it should be also noted that Art. 20 implies no modification of rights and obligations of the parties under other treaties[298], in this way proving to be unsuccessful in providing any significant interface with WTO rules[299].

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[295] This emerges for example from Art. 2, in which the so-called 'principle of complementarity of economic and cultural aspects of development' is enshrined. According to it, "since culture is one of the mainsprings of development, the cultural aspects of development are as important as its economic aspects, which individuals and people have the fundamental right to participate in and enjoy".

[296] This is also underlined by NEUWIRTH, R.J., *cit.*, at 405.

[297] "This Convention shall not affect the rights and obligations of Parties derived from other international agreements. Nor shall other international agreements affect the rights and obligations of Parties under this Convention.

When interpreting and applying other international instruments or when entering into other international obligations, Parties shall take into account the objectives and principles of the Convention".

[298] Indeed, according to para. 2, "Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties", therefore leaving the question about the relationship between the Convention and the WTO framework substantially unanswered. In ZAPATERO MIGUEL, P., PETZ, M., *Building synergies between WTO and UNESCO: the case for data-driven policy coordination*, in *International Journal of Cultural Policy*, 2018, vol. 24, issue 3, it is argued that, in practical terms, the (lack of) solutions offered by Art. 20 results in a "triumph for the commercial worldview of culture", and that in the light of the lack of effective enforcement procedures to ensure compliance with the Convention's rules.

[299] This is underlined by BURRI, M., *The UNESCO Convention on Cultural Diversity: An Appraisal Five Years After Its Entry into Force*, in *International Journal of Cultural Property*, 2013, vol. 20, issue 4, at 359.

Nevertheless, Art. 20, para. 1 – regardless of these operational limits related to the relationship with the WTO rules – seems to work as an integration clause, to be read together with Art. 21, according to which "Parties undertake to promote the objectives and principles of this Convention in other international forums"[300], showing – also at the international level – a shift from a negative approach, based on exceptions, to a positive one, actively promoting cultural diversity[301]. This might be also due to the relevant role played in the CDCE negotiations by the EU: as it has been underlined[302], when intervening in these negotiations, the European Union – a key actor in the culture-trade debate which, as already emerging from the GATT negotiations, used its significant bargaining power to put a brake on the free trade's impact on the cultural sector – directly drew upon its domestic experience, showing a more mature compromise between economic integration and safeguard of national identities, in order to reaffirm it at the international level, in coherence both with Art. 167(3) and with Art.167(4) TFEU, the latter to be applied also in EU external relations[303].

4.3 The UNESCO Convention and the WTO legal framework: the European way to the integration of economic and cultural considerations

Although it is beyond the scope of the present work, it seems important to point out the complexity of the relationship between the UNESCO Convention and the WTO legal framework, which has been considered as exemplifying the mutual fragmentation characterising the relationship between culture and trade[304]. Indeed,

300 NEUWIRTH, R.J., *"United in Divergency": A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, in *Heidelberg Journal of International Law*, 2006, issue 66, 819-862, highlights the future-oriented approach of these two provisions, affirming that they "take up the legacy left behind by ART. IV GATT, which has functioned as a political reminder of the actual link between culture and trade but equally of the strong need to rethink the mutual equilibrium between culture and trade in accordance with the respective societal and technological challenges posed at the time of consideration" (at 847).
301 HEROLD, A., *EU External Policy in the Audiovisual Field: From "Cultural Exception" to "Cultural Diversity"*, in ERA Forum, 2005, issue 1, at 103, defines the CDCE as the "international counterpart of the title on culture in the EU legal constitution".
302 HEROLD, A., *cit.*, at 103, also underlining the parallelism between the shift from the cultural exception to the cultural diversity paradigm taking place in EU external audiovisual policy and the one taking place in EU domestic audiovisual policy.
303 The EU duty to take cultural considerations into account in external action can be also found in a provision related to the common commercial policy, more specifically in Art. 207(4) TFEU, according to which the Council, for the negotiation and conclusion of agreements in the cultural and audiovisual sector potentially prejudicing Union's cultural and linguistic diversity, shall act unanimously.
304 See, among others, GRABER, C.B., *The New UNESCO Convention on Cultural Diversity: A counterbalance to the WTO?*, in *Journal of International Economic Law*, vol. 9, issue 3, 553-574, HAHN, M., *A clash of cultures? The UNESCO diversity convention and international trade law*, in *Journal of International Economic Law*, 2006, vol.9, issue 3, 515-552, RICHIERI HANANIA, L. (Ed.), *Cultural diversity in*

while according to some Authors[305] a reference to the Convention shall be introduced within the latter – in this way fully realizing the mutual support between the two instruments enshrined in Art. 20 of the CDCE and ensuring effectiveness to it – others[306] suggest a general reform of WTO rules, irrespectively of their culture-specific nature, in order to make them more capable of combining trade liberalization and achievement of public interest goals.

Regardless of the chosen perspective on the practical way of combining these two instruments, the trade versus culture "quandary[307]" still represents an issue which should be properly addressed, especially in the light of the principle of progressive liberalisation[308], as a consequence of which the issue of audiovisual sector's liberalization will inevitably resurface in future trade talks. In the light of the ongoing contrast between countries willing to open up markets and ones concerned about cultural identities survival to liberalization, it would be probably useful to concentrate efforts on an integrated approach, emancipating the concept of cultural diversity from the trade-culture dichotomy and in this way giving it more depth, also ensuring greater capability of dealing with the global digital space, implying ever-increasing exchanges between countries[309].

For what concerns the EU, it is worth mentioning that, in coherence with the second pillar of the CDCE, namely cultural cooperation, the European Commission, in the attempt to overcome the trade-culture friction, decided to foster the aforementioned cooperation by adopting either protocols on cultural cooperation, to be attached to trade agreements, or autonomous agreements on

international law: The effectiveness of the UNESCO convention on the protection and promotion of the diversity of cultural expressions, 2014, VOON, T., *UNESCO and the WTO: A clash of cultures?*, in *International & Comparative Law Quarterly*, vol. 5, issue 3.

305 See for example GRABER, C.B., *cit.*

306 See for example VOON, T., *Cultural Products and the World Trade Organization*, Cambridge, Cambridge University Press, 2007.

307 This expression is used by BROWNE, D. (ed.), *The culture/trade quandary: Canada's policy options*, Ottawa, Carleton University, Centre for Trade Policy and Law, 1998.

308 See Art. XIX GATS. According to its para. 1, "In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations". However, this provision is also counterbalance by para. 2, according to which "The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors".

309 On this see BURRI, M., *Cultural protectionism 2.0: updating cultural policy tools for the digital age*, in PAGER, S., CANDEUB, A., *Transnational Culture in the Internet Age*, Cheltenham, Edward Elgar, 2012, 182-202. The Author here argues that the trade versus culture issue "even appears as an impediment to opening digital media markets", and also criticizes the "overly vague, broad, prone to abuse" concept of cultural diversity emerging from the 2005 UNESCO Convention.

cultural cooperation[310]. Some criticalities notwithstanding[311], revealing once more the difficulties encountered in addressing the trade-culture conflict, the path followed by the EU might be considered as representing a new way of dealing with the latter. Indeed, the acknowledgment of the specificity of (specific) cultural sectors, and the consequent introduction of *ad hoc* exemptions, did not preclude the promotion of cultural cooperation, respecting at the same time the UNESCO Convention and the WTO obligations and promoting the aforementioned integrated approach, in this way also stemming the shift from the trade versus culture *quandary* to the trade versus culture *paradox*[312], already existing in the international legal order and preventing the combined consideration of these two (tendentially) conflicting elements[313].

5. The complementarity of negative and positive approach in safeguarding cultural diversity and competition law as an example

The European Union can be then considered – as anticipated – as an example of the shift from the cultural exception to the cultural diversity paradigm, which was also brought forward at the international level.

However, the latter can be interpreted in two different – and potentially conflicting – ways, as exemplified by the dichotomy *diversity as distinctiveness* (focusing on the need to avoid homogenization) and *diversity as pluralism* (on the contrary highlighting the relevance of interactions between different cultures)[314], to some extent mirroring the already examined tensions – at the European level – between Member States' willingness to safeguard national identities and EU's attempt to

[310] So far, the protocols have been integrated in three trade agreements entered into by the EU: the Economic Partnership Agreement signed with the CARIFORUM group of countries on 15 October 2008, the Free Trade Agreement signed with Korea on 6 October 2010, and the Association Agreement signed with the Central America group of countries on 29 June 2012. A stand-alone cultural cooperation agreement (CAA) has been also negotiated with Colombia and Peru in 2011. For an analysis of the contents of these protocols see, among others, PSYCHOGIOPOULOU, E., *Culture in the EU external economic relations*, in VADI, V., DE WITTE, B., *Culture and International Economic Law*, London, Routledge, 2015.

[311] For example, the CAA with Colombia and Peru is entirely disconnected from the trade agreement negotiated in parallel with the same countries, casting some doubts on the actual capability of integrating the cultural and the commercial aspects.

[312] Indeed, as underlined in DYMOND, W.A., HART, M.M., *Abundant paradox: The trade and culture debate*, in *Canadian Foreign Policy Journal*, vol. 9, issue 2, 15-33, at 32: "Paradox is a rich source for artistic creation; it is, however, a poor basis for the development of cultural trade policy".

[313] This is pointed out by NEUWIRTH, R.J., *The "Culture and Trade" Paradox Reloaded*, in DE BEUKELAER, C., PYYKKÖNEN, M., SINGH, J.P. (Ed.), *Globalization, Culture, and Development*, 2015, 91-101, at 95.

[314] This distinction is conceptualised by DE WITTE, B., *The Value of Cultural Diversity*, in MILLNS, S., AZIZ, M., *Values in the Constitution of Europe*, London, Routledge, 2007.

favour exchanges between States, at the same time fostering the European sense of belonging[315].

For these reasons, the aforementioned shift notwithstanding, besides the attempt to pursue cultural objectives through positive actions – both in external relations and at the domestic level – exceptions meant to take in due account the specificities of cultural products and services are still present in the European legal framework, as exemplified by the cultural derogation in state aid law[316].

Indeed, while on the one hand the negative approach seems to be insufficient when addressing the overarching need to take in due account cultural specificities, on the other hand it seems nevertheless to be necessary when the cultural considerations are conflicting with economic ones and a positive integration of the latter is not possible.

This complementarity of negative and positive approach rather clearly emerges when the interaction between competition law and cultural considerations is at stake. Indeed, while the evaluations assessing the compatibility with the internal market of agreements[317] and mergers[318] can be also made culturally sensitive by applying the positive approach – as will be shown in the fourth chapter – the intrinsic incompatibility of state aid discipline and need to financially support the cultural sector makes it necessary to provide for specific derogations: however – as the third chapter will extensively argue with regard to state aid discipline – even shaping these exemptions might raise some critical issues, and that because of the difficulties which can be encountered in separating the economic and the symbolic component of cultural products and services.

5.1 Some terminological clarifications, or "What we talk about when we talk about cultural considerations"

Indeed, until now, reference has been made, in very broad terms, to the general concept of cultural considerations, as opposed to economic ones, while – if the perspective of cultural economics is adopted – there are additional layers of complexity to consider, showing once more the already mentioned inextricable link between cultural and economic component and also requiring some lexical clarifications.

This need can be already perceived when the distinction between *cultural* and *creative* goods and services is addressed. Indeed, even though these terms are often

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315 On the EU approach towards cultural diversity see, among others, KRAUS, P.A., *Cultural Pluralism and European Polity-Building: Neither Westphalia nor Cosmopolis*, in *Journal of Common Market Studies*, 2003, vol. 41, no. 4, 665-686.
316 Art. 107(3)(d).
317 Art. 101 TFEU.
318 Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, 1-22.

used in an interchangeable way[319], the reference to the concept of creativity it is rather significant, since it recalls the fact that, besides traditional cultural goods and services, there are also essentially commercial products involving some kind of creativity in their production[320]. The borders between these two categories – as the exchangeable use of the names used to label them reveals – appear to be rather blurred (also in the light of the fact that, however, even creative goods and services might present a cultural dimension[321]), with significant practical consequences when the choice about the extent of an exemption's operational scope has to be made, choice which is made even more complicated on the one hand by the already mentioned uncertain borders of the concept of culture, on the other hand by the fact that cultural goods and services bring about both economic and cultural value, which, however, should be kept separate. Indeed, this distinction appears essential in order not to neglect the fact that, when elaborating the notions of value, the latter can be transformed into an economic price (economic value) or into some kind of assessment of cultural worth (cultural value)[322].

Predictably, the same kind of terminological clutter also surrounds the alternative creative/cultural industries. Attempts to draw a line between these two concepts have been made, for example linking the birth of the creative industries' concept to the technological change which took place between the late twentieth century and the early twenty-first centuries[323]. In general terms, the clarification of the different meanings to be ascribed to these notions – often overlapping and giving birth to arbitrary and debatable classifications in one category or the other – appear to be fundamental in order to shape effective public policies. However, it should also be noted how, in recent times, a tendency to consider jointly cultural and creative sectors, underling their significant spillovers in the wider economy[324], can be detected, confirming an existing tendency to broaden the definitional approaches especially in order once more to highlight the positive economic repercussions of

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319 Being the subject of the present work the integration of *cultural* considerations in EU competition law, the expression 'cultural industries' will be used.

320 In these terms THROSBY, D., *The Economics of Cultural Policy*, Cambridge, Cambridge University Press, 2010, at 17, according to whom "cultural goods and services can be seen as a sub-set of a wider category of goods that can be called creative goods and services. The latter are simply products that require some reasonably significant level of creativity in their manufacture, without necessarily satisfying other criteria that would enable them to be labelled 'cultural'".

321 This is also underlined by the European Commission in the Green Paper *Unlocking the potential of cultural and creative industries*, COM(2010)183 final, where creative industries are defined as "those industries which use culture ad an input and have a cultural dimension, although their outputs are mainly functional".

322 This is underlined by THROSBY, D., cit.,, at 41.

323 See for example CUNNINGHAM, S., *From cultural to creative industries, theory, industry and policy implications*, in *Media International Australia Incorporating Culture and Policy,* 2001, vol. 102, 54-65.

324 See the OECD *Economic and social impact of cultural and creative sectors – Note for Italy G20 Presidency Culture Working Group*, 2021.

cultural and creative activities[325]. In this process, at any rate, the contribution of cultural and creative sectors to cultural diversity it is not neglected: on the contrary, the latter is explicitly recalled also with regard to creative industries, in which the economic component seems to be more marked[326].

5.2 The dual nature of cultural goods and services

For the purposes of the present work, it seems now important to shed the light on two different aspects.

First of all, when talking about cultural considerations, it is then of the outmost importance to recall how this is not an homogeneous category, and that the cultural degree has to be assessed on a case-by-case basis, in order to take into due account the specificities of each cultural product or service and not to neglect the fact that at times, even in the production chain of the latter, more cultural oriented activities might coexist with more market oriented ones[327]. This heterogeneity has been also underlined in the so-called concentric circles model[328], which – without however relying on objective benchmarks for evaluating the cultural or the commercial contents of the goods and services produced – classifies cultural industries by putting them into four different categories. At the centre 'core creative arts'[329] – characterised by the highest proportion of cultural to commercial content – are placed, surrounded by layers expanding outwards as the cultural component decreases relative to the commercial one[330].

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325 At the EU level, this emerges also from the Explanatory Memorandum of the already mentioned Regulation of the European Parliament and of the Council establishing the Creative Europe programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013, where it is affirmed that "the cultural and creative sectors fully contribute to the Union's economic development, generating jobs and growth".

326 See UNESCO, GLOBAL ALLIANCE FOR CULTURAL DIVERSITY, *Understanding Creative Industries – Cultural statistics for public-policy making*, 2006, at 1, where it is affirmed that creative industries not only "thought to account for higher than average growth and job creation, they are also vehicles of cultural identity that play an important role in fostering cultural diversity". A similar reconstruction – labelled under the expression 'cultural cycle' – is also provided by UNESCO, *Framework for cultural statistics*, 2009, where it is affirmed that "Since cultural activities, and actors, move continuously between market and non-market activities, one must acknowledge the part played by both as well as the difficulties in measuring them".

327 For example, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *Creative Economy Report*, 2010, distinction is made between upstream and downstream creative activities, with upstream activities which are related more to the production of creative and cultural goods and downstream activities which are on the contrary more related to the market.

328 Theorized by THROSBY, D., *The concentric circles model of the cultural industries*, in *Cultural Trends*, Vol. 17, issue 3, 147-164.

329 Namely literature, music, performing arts, visual arts.

330 More specifically, moving from the centre outwards, 'other core creative industries' (film; museums, galleries, libraries; photography), 'wider cultural industries' (heritage services; publishing and print media; television and radio; sound recording; video and computer games) and 'related industries' (advertising; architecture; design; fashion) can be found.

This dual nature of cultural goods and services, explicitly acknowledged in the latest version of the *Creative Europe* programme[331], also leads to another consideration – somehow linked to the conclusions which were drawn at the end of the first chapter with regard to the instrumentality of culture – when competition law is at stake.

While it cannot be affirmed that the emergence of the economic component always makes the integration of (at this point not fully non-economic) cultural considerations in the latter easier, and that because of the fact that at times – as in the case of state aids – competition's and cultural policy's aims appear to be at odds, on the other hand, when on the contrary there is margin for integration, this close interconnection of economic and cultural values might prove to be dangerous from a purely cultural perspective. Indeed, if attention is not paid to the need to distinguish economic and cultural objectives, there might be a risk of overlapping economic and cultural values as well, neglecting the specificities of the latter and applying to it categories belonging to the economic realm[332].

[331] Regulation (EU) 2021/818 of the European Parliament and of the Council of 20 May 2021 establishing the Creative Europe Programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013, OJ L 189, 28.5.2021, at 34, where it is underlined that "The Programme should take into account the dual nature of the cultural and creative sectors, recognising, on the one hand, the intrinsic and artistic value of culture and, on the other, the economic value of those sectors, including the broader contribution of those sectors to growth, competitiveness, creativity and innovation".

[332] As recalled by THROSBY, D., cit., "Economists are deluding themselves if they claim that economics can encompass cultural value entirely within its ambit and that the methods of economic assessment are capable of capturing all relevant aspects of cultural value in their net". However, as it will be shown in the third chapter, it seems important to underline that some problems which might arise from the application of economic concepts to cultural goods and services can be also found when there is no integration of cultural considerations in competition policy, as in the case of state aid, for example when the issue of trade distortion is addressed.

Chapter III - Cultural derogation in state aid law: between compatibility and exclusion

Traditionally, among Member States, cultural policies have been representing a relevant component of the overall State action, also in line with various constitutional arrangements[333]: as a consequence, also the issue of funding, namely the cornerstone of cultural policies, appears to be tightly connected to the public sphere, and that also as a consequence of the need to correct market failures[334] and to address the so-called *economic dilemma*, the latter leading to an underproduction of cultural goods because of their qualification as public goods[335]. Even though – also in the light of the already mentioned new acknowledgement of the potential of the cultural sector from an economic perspective – a growing relevance of private actors can be noticed in many European countries, public funding – either direct or indirect[336] – in the latter still plays a key role.

If such phenomenon is observed from the competition law's perspective, relevant tensions between State intervention and the latter – and more specifically with state aid discipline – can be then detected[337], also in the light of its broad scope of application. This chapter, after giving account of the potential all-encompassing character of competition law – and that by analysing the broad interpretation which over the years has been given to the concept of undertaking and, therefore, of economic activity – will then focus on the specificities of cultural goods and services

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[333] See for example Art. 9, para. 1-2, of the Italian Constitution (1948), according to which "The Republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the Nation", Art. 24 of the Greek Constitution (1975), which states that "The protection of the natural and cultural environment constitutes a duty of the State and a right of every person", or Art. 46 of the Spanish Constitution (1978), affirming that "The public authorities shall guarantee the preservation and promote the enrichment of the historic, cultural and artistic heritage of the peoples of Spain and of the property of which it consists, regardless of its legal status and its ownership". The last constitutional text also addresses, in its Art. 44, para. 1, the need to guarantee access to culture, by stating that "The public authorities shall promote and watch over access to cultural opportunities, to which all are entitled".

[334] On the features of cultural goods and services giving rise to market failure and therefore providing an economic rationale for public intervention, see BAKHSI, H., CUNNINGHAM, S., MATEOS-GARCIA, J., *Public Policy for the Creative Industries*, in JONES, C., LORENZEN, M., SAPSED, J., *The Oxford Handbook of Creative Industries*, Oxford, Oxford University Press, 2015. More specifically, reference is made for example to the qualification of arts and culture as public goods (being therefore neither rival nor excludable) and as merit goods.

[335] This is the theory exposed in BAUMOL, W., BOWEN, W., *Performing Arts: The Economic Dilemma*, Boston, MIT Press, 1966.

[336] Indeed, public support can be provided either in a direct way, e.g. through subsidies, or in an indirect one (e.g. through tax incentives).

[337] To tackle this issue adopting a comparative approach, more specifically comparing the EU and the US, see ICHIKAWA, Y., *The Tension between Competition Policy and State Intervention: the EU and US Compared*, in *European State Aid Law Quarterly*, 2004, vol.3, issue 4, 555-572.

and on their acknowledgment by the European Commission. More specifically, attention will be first of all paid to the path which led to a formalised exception to State aid discipline when cultural activities are at stake, also highlighting how the divide between such exception and different ones often proves to be in the end rather blurred because of the already underlined "double nature" of cultural activities, in which economic and non-economic dimension coexist. Following this general introduction, account will be given of the attempts made from 2014 on to streamline public support measures to cultural activities, when their compatibility with the internal market is assessed: reference will be in particular made to the 2014 General Block Exempt Regulation and to the 2016 Commission Notice on the notion of State aid, and that with the aim of shedding light on the fact that – even though the distinguishing features of cultural activities are abstractly acknowledged – the European Institutions, and the Commission in particular, still tend to adopt an economic-based approach when evaluating public support measures to the cultural sector.

Such aspect, which will be investigated by analysing recent cases emerging from the Commission's decisional practice, appears extremely useful for the purposes of the present research to show how – in spite of a significant exception to Art. 107(1) TFEU, namely one of the pillars of competition law – in the end the economic paradigm which marks EU Institutions' reasoning prevents them from wholly acknowledging cultural specificities.

Also, with the aim of drawing a parallel with another sector characterised by a mix of economic and non-economic interests, public support measures to the sport sector will be addressed. Even though falling outside the proper scope of the research, State aid to the latter seem worth examining in order to see how the Commission found a balance between economic and non-economic interests in a field in which an explicit exception such as the one enshrined in Art.107(3)(d) TFEU is lacking.

1. The state aid discipline's broad scope of application and possible corrective interpretations

The state aid discipline – enshrined in the Artt. 107-109 TFEU – generally prohibits, at Art.107(1), "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods", and that in the light of the incompatibility with the internal market "in so far as it affects trade between Member States", conferring through Art.108 the European Commission the duty to "keep under constant review all systems of aid" existing in European Member States, the latter subject to the so-called "standstill obligation"[338].

The broad scope of application of the prohibition *ictu oculi* emerges from Art. 107(1), especially if attention is paid to the subjective side of it, namely to the aid recipients: indeed, reference is made to the rather general concept of "undertaking" – not defined in the Treaty – which identifies the addressees of the EU competition provisions. While in general the Treaty rules are addressed to the Member States as contracting parties, the reference to these particular entities was meant to prevent national barriers to free movement from being created through private anti-competitive agreements[339].

1.1 The concept of undertaking and its functional interpretation

With the aim exactly of safeguarding the integrity of the internal market, the concept of undertaking - namely the addressee of the grants potentially jeopardising the latter – has been interpreted over the years by the European Courts in a rather extensive way, exactly in order to allow an all-embracing enforcement of competition law[340].

Used at the beginning, in general terms, to define natural or legal persons with rights and obligations arising under Community law[341], the notion of undertaking started being considered, after the EEC Treaty was signed in 1957, as purely belonging to the competition realm[342] and, starting from the late 1980s, it has been interpreted by the Court of Justice of the European Union in a functional way, through an approach focusing mainly on the activities carried out by an entity and not on its formal status[343] - and that in order to ensure a uniform application of EU

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[338] More specifically, Art. 108(3) states that "The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision".

[339] This is underlined in SAUTER, W., SCHEPEL, H., *State and Market in European Union Law, the Public and the Private Spheres of the Internal Market Before the EU Courts*, Cambridge, Cambridge University Press, 2009, at 75.

[340] The broad definition of undertaking is here dealt with in order to introduce the potential issue arising from it in state aid discipline; however, it is important to underline that the functional approach adopted by the European Courts which will be examined in this paragraph is not a prerogative of this specific branch of competition law, being on the contrary related to the latter as a whole.

[341] See joined cases 32-33/58, *SNUPAT v. High Authority* [1959], ECLI:EU:C:1959:18.

[342] In the EEC Treaty the term 'undertaking' was reserved to the provisions on competition, while in the ones for example concerning the freedom of establishment the term 'company' was used.

[343] Case C-118/85, *Commission v. Italy (Tobacco products)* [1987] ECLI:EU:C:1987:283, para. 7-8, dealing with the definition of "public undertakings", where the Court stated that an economic activity is "any activity consisting in offering goods and services on the market". On the contrary, when the application of free movement provisions is at stake, the nature of the entity will be the

law across all Member States and economic sectors[344] –, more specifically assessing whether the entity considered fulfils the 'function' of an undertaking by supplying goods and services on the market[345].

This line of reasoning followed by the Court appears to be crystalised in the landmark *Höfner* ruling, in which the concept of undertaking was used to identify any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed[346], therefore reducing the whole process of identification of an undertaking to a line to be drawn between non-economic and economic activities, linking only the latter to the existence of an undertaking[347]. It appears worth underlining that, however, the concept of economic activity is not a distinctive feature of competition law, being on the contrary the latter a general prerequisite for the application of the economic rules of the Treaty: what is distinctive in the end is way of interpreting this concept, given the lack of a universal conception of economic activity[348]. Indeed, while at first the possibility to rely on a general

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only criterion to assess whether to include a specific activity in their scope: more specifically, free movement rules will apply to public entities (to be interpreted in a substantial way, in order to extend the discipline also to private entities engaged in regulatory activities). For a comparison of the criteria used to determine the scope of competition law, of free movement provision, but also of public procurement discipline, see HATZOPOULOS, V., *The Economic Constitution of the EU Treaty and the Limits between Economic and Non-economic Activities*, in *European Business Law Review*, 2012, vol.23, issue 6, 973-1007.

344 The Court, in *Tobacco Products*, exactly stated that "Having recourse to Member States' domestic law in order to limit the scope of provisions of Community law undermined the unity and effectiveness of that law and cannot, therefore, be accepted".

345 See the Opinion delivered by AG Jacobs in case C-67/96, *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430 where the Advocate General, in recalling exactly the functional approach followed by the Court, affirms that "With respect to public bodies the Court examines whether the activity in question is — at least potentially — performed by private entities engaged in the supply of goods or services. Individuals, too, may be classified as undertakings if they are independent economic actors on the markets for goods or services. The rationale underlying those cases is that the entities under scrutiny are fulfilling the 'function' of an undertaking. The application of Articles 85 and 86 is justified by the fact that those public bodies or individuals are operating on the same or similar markets and according to similar principles as 'normal' undertakings".

346 Case C-41/90, *Höfner and Elser v. Macrotron GmbH* [1991] ECLI:EU:C:1991:14, para. 21.

347 The functional nature of the Court's approach was accurately summarized by AG Jacobs in his Opinion delivered in joined cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband v. Ichthyol-Gesellschaft Cordes* [2003] ECLI:EU:C:2004:150, para. 25. According to the AG: "The Court's general approach to whether a given entity is an undertaking within the meaning of the Community competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it […] Provided that an activity is of an economic character, those engaged in it will be subject to Community competition law". As a consequence, the same entity might be found to be an undertaking when carrying out certain (economic) activities, but this qualification might be at the same time excluded when other (non-economic) activities are performed.

348 This aspect is highlighted by ODUDU, O., *Economic Activity as a Limit to Community Law*, in BARNARD, C., ODUDU, O, *The Outer Limits of European Union Law*, Oxford, Hart, 2009, at 227.

definition of economic activity was not ruled out[349], it was later reaffirmed that "the scope of freedom of competition and that of the freedom to provide services are not identical"[350], also in the light of the fact that, within the EU legal framework, it is possible to find different notions of economic activity and, consequently, the criteria to be applied in assessing the existence of the latter have to be determined using a case-by-case method[351]. The different meaning of economic activity emerges for example in comparing internal market rules and competition rules: while in the first case remuneration will be considered as a proof of the economic nature of an activity, in the second case the potential to make profit will be required[352]

1.2 The abstract reasoning in Höfner and possible limits to the qualification as economic activities: a focus on State prerogatives

Interestingly, in *Höfner*, the Court , when evaluating the economic nature of the activities carried out by the entity examined, seems to reason in rather abstract terms, by affirming that "the fact that employment procurement activities" – namely the ones the nature of which was addressed in the present ruling – "are *normally* entrusted to public agencies cannot affect the economic nature of such activities": in other words, the judges appear incline to qualify as economic activities which can be *potentially* carried out by private undertakings, in this way also choosing not to follow the method for example used by Art. 57 TFEU to define services: indeed, according to this provision, the latter can be qualified as services within the meaning of the Treaties where they are *normally* provided for remuneration, where remuneration is considered as the main element revealing the economic character of the activity.

However, even though a detailed analysis of the CJEU's jurisprudence on the definition of undertaking falls outside the scope of the present work, nevertheless it appears important to underline that the functional and abstract approach followed in *Höfner* soon started to be combined with other more practical criteria. For

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349 See for example the reasoning of the General Court in case T-313/02, *David Meca-Medina and Igor Majcen v. Commission of the European Communities* [2004] ECLI:EU:T:2004:283, at para.42
350 Case C-205/03 P *Federación Española de Empresas De Tecnología Sanitaria (FENIN) v. Commission* [2006], ECLI:EU:C:2006:453, Opinion of AG Poiares Maduro, at 51.
351 See the Opinion delivered by Advocate General Kokott in the case C-284/04, *T-Mobile Austria GmbH and Others v. Republik Österreich* [2007] ECLI:EU:C:2007:381, where the AG pointed out that competition law and the Sixth VAT Directive were based on "differing concepts of economic activity", at para. 61. The same line of reasoning was also followed by the Court of Justice in reviewing the General Court's ruling in case T-313/02, where it was reversed the General Court's reconstruction according to which a universal definition of economic activity could be detected (see in particular para. 33).
352 The possibility that the same activity will be for example considered subject to internal market rules but not on state aid ones is expressly acknowledged by Advocate General Maduro in the already mentioned opinion in the FENIN case, where it is affirmed that "there is nothing to prevent a transaction involving an exchange being classified as the provision of services, even where the parties to the exchange are not undertakings for the purposes of competition law" (at para. 51).

example, in evaluating the economic nature of an activity, the Court started checking for example whether the latter was concretely carried out by private undertakings competing with one another[353] or whether the entity in question was carrying out the activities receiving remuneration from the buyer[354]. In general, lacking a consistent definition of economic activity in the case law[355], what emerges from the jurisprudence is a tendency to consider it as existing upon the occurrence of two different elements, namely the offer of goods and services – and here the assessment will revolve around the concept of remuneration – and the existence of a market – resorting to the so-called principle of the private investor in a market economy, according to which it is necessary to assess whether an either actual or potential market exist in which also other undertakings carry out the activity in question or in which they may enter to operate[356].

It appears worth recalling that the categorisation of a given activity is at any rate a flexible one: indeed, as also underlined by the European Commission, "what is not an economic activity today may become one in the future, and vice versa"[357].

Exactly when tracing the divide between economic and non-economic activities, the Court seems at times to adopt a milder functional criterion in order to take into account the peculiar features of the activities carried out by the State or by State entities exercising public authority functions[358]: indeed, when addressing the latter

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353 See for example case C-244/94, *Fédération Française des Sociétés d'Assurance v. Ministère de l'Agriculture et de la Pêche* [1995], ECLI:EU:C:1995:254, para. 17, case C-327/12, *Ministero dello Sviluppo Economico v. Soa Nazionale Costruzioni* [2013] EU:C:2013:827, para. 35.

354 See for example case C-35/96, *Commission of the European Communities v. Italian Republic* [1998] EU:C:1998:303, para.37, case C-189-184/98, *Pavel Pavlov and others v Stichting Pensioenfonds Medische Specialisten* [1999] ECLI:EU:C:2000:428, para. 76, case C-309/99, *Wouters and others v Nederlandse Orde van Advocaten* ECLI:EU:C:2002:98, para 48.

355 It is true that in *Tobacco Products* economic activities are defined as anticipated as offering goods and services on the market, nevertheless, as underlined by VAN DER GRONDEN, W., *Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?* in *World Competition*, vol. 41, issue 2, 197-223, at 199, "this definition appears to be a circular line of reasoning, as the CJEU has inserted the term 'market'. By using this term, the CJEU essentially refers back to the term 'economic'. At least, it is very difficult to construe an economic activity that is not a market activity: 'economic' presupposes the supply of a particular product on the market, which entails competition between various undertakings".

356 The need to take into account these two elements in assessing the economic nature of the activities carried out by an entity is affirmed by SAUTER, W., SCHEPEL, H., *supra*.

357 Commission Notice on the notion of State aid as referred to in Art. 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, para. 13. Exemplificative of this flexibility can be considered the social public services, such as healthcare and social security, which, one regarded as lacking relevant economic significance, are now considered as economic and, on this ground, not immune from EU competition law. On this topic see GALLO, D., *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare*, 2020, in *European Public Law*, vol. 26, issue 3, 569-586.

358 Indeed, as recalled in *Tobacco Products*, para. 5, "The State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market". In the case law, reference is frequently made to the Opinion given by AG Mayras in case 2/74, *Reyners v. Belgian State* [1974] ECLI:EU:C:1974:68, according to

in defining the competition provisions' subjective scope of application, the interpretive work of the judges might end up endangering the precarious equilibrium between the Member States' sovereign prerogatives with regard to the provision of certain services and the need to safeguard the integrity of the internal market[359], so a more cautious approach might prove to be crucial in order not to disrupt it.

This tendency – considered by AG Jacobs, in his aforementioned Opinion in the *Albany* case, as already detectable in *Höfner*[360] – can be for example found in the *Eurocontrol* case[361], dealing with the qualification of air traffic control activities. The Court, adopting a two-pronged approach, focused on the special authoritative powers – typical of State action – exercised by the *European Organization for the Safety of Air Navigation* (Eurocontrol)[362] to then move to the specificities of the interests targeted by the airspace supervision activity performed by it. More specifically, the Court acknowledged the public interest character of the latter, recalling the fact that the supervision was benefitting each aircraft present in the airspace, independently from the payment of the route charges owed[363]. These two elements, combined, led then the Court to qualify Eurocontrol's tasks as expression of the typical powers of a public authority, consequently exonerating them from the application of the Treaty rules on competition[364].

which "Official authority is that which arises from the sovereignty and majesty of the State: for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens".

359This is underlined by AG Poiares Maduro in the *FENIN* case, at para. 26: "In seeking to determine whether an activity carried on by the State or a State entity is of an economic nature, the Court is entering dangerous territory, since it must find a balance between the need to protect undistorted competition on the common market and respect for the powers of the Member States".

360 See para. 314, where AG Jacobs affirms that: "an entity's activities may be sheltered from the applicability of the competition rules in two situations. First, the competition rules are not applicable to 'activities in the exercise of official authority' or emanations of the State acting 'in their capacity as public authorities'. In that context it is immaterial whether the State exercises its official authority directly through a body forming part of the State administration or by way of a private body on which it has conferred special or exclusive right. An entity acts in the exercise of official authority where the activity in question is 'a task in the public interest which forms part of the essential functions of the State' and where that activity 'is connected by its nature, its aim and the rules to which it is subject with the exercise of powers... which are typically those of a public authority'. Secondly, it seems to follow from paragraph 22 of the judgment in *Höfner* that the competition rules do not apply if the activity in question has always been and is necessarily carried out by public entities".

361 Case C-364/92, *SAT Fluggesellschaft mbH Eurocontrol* [1994] ECLI:EU:C:1994:7.

362 *Ibid.*, at para 23-24.

363 *Ibid.,* at para 25-27. See also the Opinion delivered by AG Tesauro, ECLI:EU:C:1993:878, where it was affirmed that: "The fact that we are dealing with a service, not in the economic sense and provided principally for businesses (airline companies), but aimed at the community as a whole, seems to me to be confirmed by the observation made during the hearing and not disputed by SAT, that control is exercised in respect of any aircraft, within the air space under the authority of Eurocontrol, irrespective of whether or not the owner has paid the route charge" (at para.13).

364 *Ibid.*, at para 30.

A similar line of reasoning was also followed by the Court in the illustrative *Diego Calì* case[365]. Here, the Court, in assessing the economic nature of the anti-pollution surveillance carried out in the harbour of Genua by a private entity (*Servizi Ecologici Porto di Genova - SEPG*), on delegation by a public body (*Consorzio Autonomo del Porto - CAP*), considered the aim of the surveillance, namely the protection of the environment in maritime areas, as a public interest belonging to "the essential functions of the State", therefore excluding SEPG from the scope of application of competition law. The non-economic nature of the activity was further investigated by the Advocate General who, in his Opinion[366], stressed first of all that the marine environment should be considered as a public asset to be protected in the interest of both the State and the inhabitants of the area[367], and then also affirmed that the activity should be directly connected "to the function of policing the maritime area of the port", something which, in the AG's reconstruction, represents a "function that may be exercised by a public authority, regardless of the legal form adopted"[368]. With regard to the existence of a market, he furthermore significantly asserted that the activity performed by SEPG – in the light of these characteristics – could not possibly be carried out in a competitive system, and that in the light of it being a "public service unrelated to commercial profit-making activity" which needs to be performed irrespectively of the payment of fees[369]. In more general terms, AG Cosmas highlighted how the protection of the environment should be considered as a "core state activity", meant to safeguard the general interest, and not something which could be performed by an undertaking[370].

These two judgements served also as basis for the *Compass-Datenbank* case[371], concerning the nature of the activity of an undertaking administrating a public register of companies. According to the Court, on the basis of a statutory obligation to disclose the data, both the data collection and the making available to the public were falling within the exercise of public powers, therefore not constituting economic activity[372].

Interestingly, in this case the judges grounded their decision merely on the concept of *imperium* – namely on public authority – while an in-depth analysis of the

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365 Case C-343/95, *Diego Calì e Figli Srl v. Servizi ecologici porto di Genova SpA* [1997] ECLI:EU:C:1997:160.
366 Opinion of AG Cosmas in case C-343/95, ECLI:EU:C:1996:482.
367 *Ibid.*, at para. 46.
368 *Ibid.*, at para. 47.
369 *Ibid.*, at para. 49. Indeed, in the Advocate General's perspective, carrying out the anti-pollution surveillance within a competitive system "would jeopardize, if not destroy, the effectiveness of the system of safeguards as regards both the port environment and the safety of ports users and inhabitants of the surrounding areas".
370 *Ibid.*, at para. 56.
371 Case C-138/11, *Compass-Datenbank GmbH v. Republik Österreich* ECLI:EU:C:2012:449.
372 *Ibid*, at para 40.

activity's nature is conducted only by the Advocate General[373]: in other words, it is possible to conclude that the Court in *Compass* seems to follow a more formal approach, linking the non-economic nature of an activity directly to the existence of a public power, somehow frustrating the reasons underlying the functional approach itself[374].

It must be noted, however, that – in spite of this possible misunderstanding about these two different concepts, also bolstered by some *obiter dicta* in the case-law[375] – the Court also affirmed the need not to mistake the existence of state prerogatives for a proof of the lack of economic nature of an activity: this emerges for example in a case related to the possibility of applying the competition rules to the regulatory activity of a public telecommunications undertaking[376], but it was also underlined in cases in which the Court in the end excluded the presence of an economic activity in the light of the *imperium* exercised by the analysed entity[377].

1.3 Economic nature and market failures: a focus on the provision of non-excludable goods

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[373] See the Opinion of AG Jääskinen, ECLI:EU:C:2012:251, where it is underlined that the storage of data in the undertakings register is "an activity undertaken in the general interest of legal certainty" (at para. 48) and that "it should be noted that although private parties have the physical capacity to create, collect and commercialise business information data, they are not able to confer on it the legal status that characterises the data recorded in the official undertaking register […] The express purpose of public registers such as the undertakings register is to create a source of information that can be relied on in legal relations, and thereby provide the legal certainty necessary for exchange on the market".

[374] This is also underlined by KLOOSTERHUIS, E., *Defining non-economic activities in competition law*, in *European Competition Journal*, 2017, vol. 13, issue 1, 117-149, at 127. The Author here underlines how, if this method is followed, "a side issue threatens to become a main issue".

[375] See for example the case T-231/06, *Netherlands and NOS v. Commission* [2010] ECLI:EU:T:2010:525, in which reference to the *Eurocontrol* case was made to prove how "according to the case-law of the Court of Justice, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the Treaty rules of competition".

[376] See case 41/83, *Italy v. Commission* [1985] ECLI:EU:C:1985:120, at para. 16-20. The need not to overlap the two concepts was also underlined by the General Court, for example in *Aéroports de Paris* (Case T-128/98, ECLI:EU:T:2000:290), in which it was affirmed that the fact that an activity was performed within the framework of a system of special supervision of publicly-owned property could not be considered as leaving out the economic character of the activity itself. See also case T-155/04, *SELEX Sistemi Integrati SpA v. Commission of the European Communities* [2006] ECLI:EU:T:2006:387, where the need to distinguish activities involving the exercise of public authority and economic ones, even though carried out by the same entity, was highlighted ("Since the Treaty provisions on competition are applicable to the activities of an entity which can be severed from those in which it engages as a public authority, the various activities of an entity must be considered individually and the treatment of some of them as powers of public authority does not mean that it must be concluded that the other activities are not economic", at para.54).

[377] See for example the Opinion delivered by AG Tesauro in the aforementioned *Eurocontrol* case, ECLI:EU:C:1993:878, where it was significantly affirmed that: "The performance of duties involving the exercise of public authority by a body may prevent the range of activities carried on by it from being subject to the rules on competition only where those duties form an inseparable part of the activity in question".

As underlined in the previous subparagraph, the functional approach adopted by the European Courts in defining the concept of understanding has been – up to a certain extent – mitigated, and that in order not to unduly extend the scope of competition law by including within it some activities which cannot be performed by private actors but all the same need to be carried out in the light of their relevance for the general interest. More specifically, the Court at times ruled out the existence of an economic activity for example when an exercise of public authority was detected[378]: however, as already pointed out, merely focusing on a formal element such as the exercise of public authority might end up frustrating the aim of the functional approach itself.

In order to better understand how to re-interpret the usual way of delimiting the concept of undertaking, without falling in this deceit but at the same time avoiding a suboptimal provision of certain goods and services from a public policy perspective, the concept of market failures has been recalled[379], given the complementary role of markets and governments which it implies.

As it has been noted before[380], already in *Höfner* some kind of distinctive character was acknowledged to activities benefitting the society as a whole and which, for this reason, cannot be subject to market transactions between sellers and individual

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378 The exercise of public authority, however, is not the only characteristic which enabled the Court to qualify an activity as non-economic. Indeed, according to the Court's case law, the same might happen when an activity is expression of social solidarity (for example in the healthcare sector) and informed by a redistribution logic, not a market one. This is for example underlined in the *Bosman* case (case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, ECLI:EU:C:1995:463) by Advocate General Lenz, who noted that "[…] football is characterized by the mutual economic dependence of the clubs […] Each club thus needs the other one in other to be successful. For that reason each club has an interest in the health of the other clubs. The clubs in a professional league thus do not have the aim of excluding their competitors from the market. Therein lies […] a significant difference from the competitive relationship between undertakings in other markets" (at para. 227). It is exactly this redistributive character to require State intervention: as recalled by Advocate General Jacobs in his opinion delivered in the aforementioned *Albany* case, it is not possible to "see any – even theoretical – possibility that without State intervention private undertakings could offer on the markets a pension scheme based on the redistribution principle. Nobody would be prepared to pay for the pensions of others without a guarantee that the next generation would do the same" (at para. 339). However, this clear-cut distinction between redistributive and market logic notwithstanding, the redistributive character of an activity might be difficult to detect, and a consequence it might be more complex to rule out the economic nature of it.
This is affirmed once more by Advocate General Jacobs, this time in the opinion delivered in the *Cisal* case (*Cisal di Battistello Venanzio & C. Sas v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* [2002] ECLI:EU:C:2002:36), where the AG underlined that: "Under the Court's case-law the elements of solidarity present in the ruled governing the activities of the body in question are relevant. Those elements may be so fundamental and predominant that as a matter of principle no private insurer can offer that type of insurance on the market. On the other hand, they may not go so far as to prevent its activities from being regarded as economic activities" (at para. 67).

379 See KLOOSTERHUIS, E., *supra*..

380 See BUENDIA SIERRA, J.L., *Exclusive Rights and State Monopolies under EC Law*, 1999, Oxford, Oxford University Press, at 48. More specifically, the Author draws a line between "specific" and "diffuse" activities.

buyers. In more general terms, a connection can be traced between the need for state intervention (and consequent non-application of competition law in the light of the non-economic nature of the activities concerned) and the provision of public goods.

The latter, as it has been underlined in the economic literature, are characterised by two distinctive features, namely non-excludability, because of the impossibility to exclude individual consumers from their benefits, and non-rivalry, a characteristics which is on the contrary related to the fact that, once produced, a potentially infinite number of consumers will have the possibility to enjoy the goods themselves without neither increased production costs nor diminished enjoyment by other consumers. Even though both these characteristics tendentially rule out the possibility of making profit, in the attempt to define the boundaries of the concept of non-economic activity emphasis should be however placed on non-excludability, which results in the impossibility to subordinate the enjoyment to the payment of a fee[381], and that also in the light of the attention paid by the jurisprudence to the concept of remuneration when drawing the divide between economic and non-economic activities[382]. Non-excludability is also the cause behind the so-called *coordination failure*, namely the undersupply of the non-excludable good itself – which can be either a public good or a common resource, the latter characterised by non-excludability but the consumption of which is rivalrous – if its production is left to the market: thus, in order to avoid this failure, government intervention is necessary, making the application of competition law useless, given the lack of a proper market. Indeed, as it has also been affirmed by Advocate General Jacobs in *Cisal*, the question to be asked when assessing the nature of an entity, in order to understand whether to qualify it as an undertaking, is whether the entity itself "is in a position to generate the effects which the competition rules seek to prevent"[383]: it would be aimless to extend the competition rules to cases in which the role of the State proves to be fundamental to supply goods or services which the privates would not otherwise produce[384].

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381 The presence of a fee is on the contrary the element characterising the so-called *club goods*, which are not-rivalrous but excludable.

382 The need to refer to the non-excludable character is also underlined by KLOOSTERHUIS, E, *supra.*, who also recalls how the non-rivalry does not necessarily have an impact on the economic nature of an activity, merely implying economies of scale facilitating the creation of dominant positions.

383 Opinion of Advocate General Jacobs in case C-218/00, EU:C:2001:448, at para. 71.

384 However, as underlined by VAN DER GRONDEN, W., *supra*, at 221, there is not general incompatibility between public authorities' entitlement to pursue general interest objectives and competition law. Indeed, notions such as the services of general economic interest (SGEI) have been developed exactly to moderate the effects of competition discipline, and denying the possible coexistence of economic nature and public interest would make this concept pointless.

2. State aid discipline and the cultural field: from a factual to a formalised exception

However, in spite of this general aversion towards any kind of government support measures implying the use of public resources[385] – and consequently in spite of the crucial role played by state aid discipline in avoiding distortion of the internal market[386] – , state aids are also undeniably used by Member State to pursue policy-making and regulatory objectives[387], and that also thanks to the explicit provision in the Treaty of exceptions which would make any attempt to completely ban the integration of these aims rather unrealistic[388]. Among these exceptions, this Chapter will focus on the cultural one, enshrined in Art.107(3)(d) TFEU.

2.1 The pre-Maastricht context

As it has been already pointed out in the first Chapter, even before the introduction of the cultural derogation and of the cultural mainstreaming clause the European Institutions had been integrating cultural sectors' specificities in their action. With specific regard to state aid discipline, it was mainly public support to film production activities to fall under the scrutiny of the Commission.
In examining some decisions concerning public support measures in this sector and their compatibility with the internal market rules, a common thread emerges, namely the Commission's concerns towards potential breaches of the freedom of movement[389]. Indeed, while tendentially open to qualify these (cultural policy) measures as industrial policy ones – and therefore to considered them exempted from the state aid prohibition by applying the industrial derogation now contained in Art.107(3)(c) TFEU[390] because of the dual nature of the audiovisual sector – the

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[385] The existence of a presumption that any state aid would cause a distortion of the market is underlined, among others, by CROCIONI, P., *Can state aid policy become more economic friendly?* in *World Competition*, 2006, vol.29, issue 1, 89-108, at 90.
[386] As exemplified by former competition Commissioner Kroes: "If there were no State aid rules, governments would be tempted to start a costly subsidy war, stealing the bread from each other's table, instead of creating better ways to bake new bread" (*In defence of competition policy*, opening remark at the conference *Competition policy, growth and consumer purchasing power*, October 2008)
[387] The Member States' tendency to pursue policy-making and regulatory aims though state aid is highlighted for example by KOENIG, C., *Where is State Aid Law heading to?* in *European State Aid Law Quarterly*, 2014, vol.13, no. 4, 611-613., at 611.
[388] The cautious approach followed by the Treaty, providing exceptions besides the prohibition of state aid, is recalled by BUENDIA SIERRA, J.L., *An analysis of Article 86(2) EC*, in RYDELSKI, M.S. (ed), *The EC state aid regime: Distortive effects of state aid on competition and trade*, 2006, Cameron May, 541 ff., at 542.
[389] For an overview see LOMAN, J.M.E. *et al.*, *Culture and Community Law. Before and After Maastricht*, Alphen aan den Rijn, Kluver Law International, 1992, at 135-138.
[390] According to it, "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest" might be considered as compatible with the internal market.

Commission always recalled the need to respect the freedom of movement principle. Indeed, in examining national schemes meant to promote national works, the EC considered the favour for film producers directly belonging to the country adopting the measure – a feature directly functional to the safeguard and promotion of national cultural identity, namely the main aim of the scrutinized measures themselves – as conflicting with the free movement of persons. This approach is exemplified by a 1988 decision concerning aids awarded by the Greek government – both as automatic subsidies and selective aids – for the production of Greek films[391]. In this case, the Commission – although aware of the relevance of state aids in maintaining and developing the film industry and of the link between the latter and the strengthening of national identity – noted how some of the conditions governing the grant represented restrictions based on nationality (for example by attaching the eligibility to receive the aid to the Greek nationality of the film director), and consequently required the Greek government to amend the aid scheme in order to make it compatible with internal market rules, ruling out the possibility of retaining the restrictions based on nationality on grounds of cultural identity.

2.2 The introduction of an explicit cultural derogation: art. 107(3)(d) TFEU

Thus, even before 1992 Member States had the possibility to adopt public support measures to the cultural sector by relying on the industrial derogation, and that when the economic and the cultural dimensions of the financed cultural activity appeared to be closely related with each other and always provided that the internal market rules, and more specifically the rules on free movement, were not infringed. More in general, national governments could lean on the fact that, even though the Treaty – and in particular the rules on free movement and competition – applied to all gainful activities irrespectively on their economic or cultural nature, no provision was specifically prohibiting Member States from assisting the national arts.

However, this solution could not be considered as wholly satisfactory, first of all because of the issues potentially arising when the financed activity had not economic component – in this way precluding the application of the industrial derogation -, but also because by resorting to the latter no autonomy was recognised to cultural considerations, something which after the Maastricht Treaty could not be considered as consistent with the cultural mainstreaming clause which was introduced through it. These reasons then led to what is now Art.107(3)(d) TFEU, according to which it is possible to consider compatible with the internal market support measures aiming at promoting culture and heritage conservation, provided

[391] Commission Decision 89/441/EEC of 21 December 1988 on aid granted by the Greek Government to the film industry for the production of Greek films, OJ L 208, 20.07.1989, at 38.

that they do not affect trading conditions and competition in the Union to an extent that is contrary to the common interest.

This derogation has been significantly placed among the facultative exceptions enlisted in paragraph 3, not among the *de jure* ones, under paragraph 2[392]. This choice might be considered as inspired by the same logic of Art.167 TFEU: indeed, in both cases there is no obligation to prioritise cultural considerations over different ones, being the European Institutions on the contrary required to strike a balance, balance which – in the case of state aids – have to be found between national support schemes (and therefore Member States' prerogatives in the cultural sector) and integrity of the internal market, in order to safeguard the latter without at the same time jeopardising cultural diversity by indirectly favouring cultural uniformity[393].

Over the years, the Commission had used the cultural derogation to declare compatible with the internal market a number of measures with a clear cultural component, resorting to other exceptions – such as the industrial one enshrined in Art.107(3)(c) or the one related to the services of general economic interest *ex* Art. 106(2) – when the cultural aim appeared to be intertwined with other goals, such as the development of a particular sector of a Member State's industry or the satisfaction of the social and democratic needs of a country[394].

2.2.1 Public support to cultural industries: ensuring a diversified output

This potential overlap of different goals especially emerges when cultural industries are analysed. Indeed, even though the main rationale of the public funding to the latter is the protection of a diversified cultural offer through the support to varied artistic expression, whence the key role played by Art.107(3)(d), resort can be also made – in the light of the dual nature of the financed sector – to different exceptions, other than the cultural one. In this subparagraph, account of this phenomenon will be briefly given by providing some insights from the audiovisual and the publishing fields.

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[392] Indeed, paragraph 3 lists the measures which *may* be considered compatible with the internal market, while paragraph 2 addresses the measures which *shall* be compatible.

[393] Public funding is considered as a tool to prevent cultural uniformity by FERRI, D., *La Costituzione culturale dell'Unione Europea*, cit.

[394] For a detailed overview of Commission's decisions see the legal scholarship on this topic, upon which this paragraph partially builds: BELLUCCI, L, *Cinema e aiuti di stato nell'integrazione europea*, Milano, Giuffrè, 2006, ID., *National support for film production in the EU: An analysis of the Commission decision-making practice*, in *European Law Journal*, 2010, vol. 16, issue 2, 211-232; FERRI, D., *supra*; CRAUFORD SMITH, R., *Balancing culture and competition: State support for film and television in European Community Law*, in *Cambridge Yearbook of European Legal Studies*, 2008, 35-66; HEROLD, A., *European film policies in EU and international law. Culture and trade marriage or misalliance?*, 2010, Europa Law; PSYCHOGIOPOULOU, E., *EC state aid control and cultural justifications*, in *Legal Issues of Economic Integration*, 2006, vol. 33, issue 1, 3-28; ID., *The integration of cultural considerations in EU law and policies*, cit. ; ID., *The "cultural" criterion in the European Commission's assessment of state aids to the audio-visual sector*, in *Legal Issues of Economic Integration*, 2010, vol. 37, issue 4, 273-291.

In the audio-visual sector, the coexistence of Art.107(3)(d) and Art.107(3)(c) had been rather common, at least until the enactment of the 2013 *Cinema Communication*[395]. Indeed, while national support measures aiming at fostering film production were generally evaluated under Art. 107(3)(d) – using specific criteria which emerged in a case related to a French aid scheme supporting international co-productions[396] and were formalised in the 2001 *Cinema Communication*[397] – the ones targeting post-production were traditionally assessed under Art. 107(3)(c), even though at times also a combined resort to these two different exceptions in the same decision could be also detected[398].

Interestingly, the Commission – favourably inclined towards national measures supporting the audiovisual sector, tendentially considering the benefits brought by them capable of overcoming the concerns for market integrity[399] – in spite of some concerns related to the room of discretion left to the Member States for example in evaluating the cultural character of a product[400], proved to be rather confident

[395] Communication from the Commission on State aid for films and other audiovisual works, OJ C 332, 15.11.2013, at 1.

[396] State aid N3/98 - France, *Support for cinema production*.

[397] European Commission, Communication on certain legal aspects relating to cinematographic and other audiovisual works, COM(2001) 534. According to this Communication, aid schemes first of all had to respect the so-called "general legality" principle: as a consequence, the Commission was called upon to verify that the support measure did not contain clauses contrary to provisions of the Treaty in fields other that State aid. Besides this preliminary test, the Communication also required the aid to be directed to a cultural product – the existence of which to be verified according to verifiable national criteria – and to leave the producer free to spend at least 20% of the film budget in a different Member State, without suffering any reduction in the support measure (meaning that, for the remaining 80% of the budget, the Commission accepted the so-called territorialization clauses, providing that, in return for the support measure granted, part of the latter or of the film budget must be spent in the territory where the aid scheme is administered, where it is funded through taxes or other public resourced, where it is meant to contribute to the achievement of certain cultural or economic policy goals). In the 2001 Communication the Commission also established that aid intensity – except in the case of difficult and low budget films – must be limited to 50% of the production budget, and that in order to stimulate those commercial activities typical of a market economy, and also prohibited aid supplements for specific filmmaking activities, such as post-production – in order to ensure a neutral incentive of the aid itself.

[398] See for example Aid N 325/2010 - Slovenia, *Co-financing of the creation of media programmes – prolongation of the scheme*.

[399] See, e.g. Aid N. 486/2001 – Denmark*, Film Venture Funds*, N 440/2001 – Germany, *Support for the film industry in the German Länder – Mitteldeutsche Medienförderung GmbH*, Aid N 410/2002 – Belgium, *State aid to Belgian cinema and audiovisual production* – The cinema 'Tax Shelter' scheme, Aid N 513/2003 - Germany, *Fernsehfilmförderungsfond*, N 681/2002 – Belgium, *Soutien à la production cinématographique et audiovisuelle par la Communauté flamande de Belgique*: Vlaams *Audiovisueel Fonds vzw.*, Aid N 261/2005 – France, *Aide à la creation audiovisuelle innovante*, 9.11.2005.

[400] Indeed, in some cases the Commission expressly took into account the presence of a verifiable national cultural test. See for example SA.3380 (2011/N) – France, *Aides aux cinemas du monde (aide sélective à la production cinématographique*), N170/2010, *Financial support for cinema projects,* SA. 34722 – Belgium, *Screen Flanders*, SA. 31849 (N498/2010) – Italy, *Film production in South Tyrol.* Sometimes, in order to guarantee a more objective assessment, the presence of an expert committee to evaluate the cultural nature of the financed activity was also provided for. See for example Aid N280/09 –

towards Member States themselves, somehow curbing that mistrust which was on the contrary due to the fear of protectionist measures disguised as cultural ones[401].

A proof of this approach followed by the Commission – which, however, also recalled the need not to overlap competition and cultural policy[402] – can be considered the 2013 *Cinema Communication*. Indeed, apart from the slightly modified criteria regarding aid intensity, what appears first of all worth underlining is that the Member States' entitlement to autonomously assess the cultural nature of the financed activity is fully acknowledged in this document, in full compliance with the subsidiarity principle and in order to avoid unduly Commission's interferences[403]. Secondly, this Communication is also relevant because it extends the range of activities – from story concept to presentation to the audience – which shall be subject to an evaluation of compatibility with the internal market under Art.107(3)(d)[404], with a consequential reduction of the scope of Art.107(3)(c). Interestingly, some kind of broadening of the cultural exception's scope also involved, even before 2013, "non-conventional" cultural products, such as videogames. The possibility of assessing the compatibility with the internal market of the latter – not covered, because of their characteristics, by the 2013 Cinema Communication[405] – on the basis of Art.107(3)(d) has been indeed widely

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Spain, B*asque aid for the creation, development and production of audiovisual works*, Aid N 221/2010 - Italy, *Cinema Toscana*, SA.35678 (2012/N) - Italy, *Lazio regional film support scheme*.

401 This more positive attitude can be considered as a consequence of the attempt made by the Council to safeguard Member States cultural interests also by underlining the positive effects of national support measures on the overall European audiovisual industry. See, in this regard, the Council Resolution of 12 February 2001, National aid to the film and audiovisual industries, OJ C 73, 6.3.2001, at 3. Here the Council expressly reaffirmed – in the light of the audiovisual industry's structural weaknesses and of the need to support the industrial fabric necessary to the achievement of cultural diversity – the Member States' entitlement to carry out national policies aimed at supporting the creation of film and audiovisual products.

402 See the answer given by Mr Monti on behalf of the Commission to the Written Question P-3173/00 by Valter Veltroni (OJ C 163 E, 6.6.2001) on the Commission's assessment criteria applying to national support measures in favour of the film and the audiovisual industry. Here it was highlighted that, the attention paid to cultural goals in applying competition rules notwithstanding, it is not possible to use considered these rules as a proper instrument to achieve cultural policy objectives.

403 2013 Cinema Communication, at para. 25: "In assessing an audiovisual support scheme, the Commission acknowledges that its task is limited to verifying whether a Member State has a relevant, effective verification mechanism in place able to avoid manifest error".

404 More specifically, para. 52 refers to schemes designed to support the scriptwriting, development, production, distribution and promotion of audiovisual works. However, even though measures supporting the production of European audiovisual works are aimed at shaping European cultural identities and at promoting cultural diversity, therefore requiring the application of Art.107(3)(d) which shall be then considered as the main exception to apply, the possibility of resorting to Art. 107(3)(c) and Art.107(3)(a) is not ruled out for support measures targeting undertakings in the film and TV programme production sector (see para.51).

405 *Ibid.*, para. 24: "Conversely, although games may represent one of the fastest-growing form of mass media in the coming years, not all games necessarily qualify as audiovisual works or cultural products. They have other characteristics regarding production, distribution, marketing, and consumption than films. Therefore, the rules designed for film production cannot apply

recognised, even though, in the light of the peculiar nature of videogames, the cultural test plays even more a crucial role, in order to prove their capability of conveying a cultural value, therefore contributing to the safeguard of contents' diversity[406].

This choice might be considered as revealing of this greater trust towards Member States: indeed, lacking a definition of culture, Art.107(3)(d) gives a broad room of discretion to national authorities, fully realising that subsidiarity principle which is central in the cultural policy sector but at the same time making a control by the Commission more difficult.

However, in the audiovisual field Art.107(3)(c) is not – at least theoretically – the only competitor of Art.107(3)(d): indeed, if public service media (PSM) are analysed, a potential overlap – not fully explored by the Commission – between the latter and art.106(2) TFEU, namely the exception for the services of general economic interest (SGEI), can be detected. According to this provision, undertakings which are entrusted with the operation of services of general economic interest, or which have the character of a revenue-producing monopoly – shall respect the Treaties and in particular the competition discipline, in so far as the performance of the tasks assigned to them are not obstructed by such rules. Also public cultural activities – and that in the light of the wide notion of SGEI[407] and of the aforementioned market failures which prevent these activities from being provided by the market – can be entrusted to undertakings and therefore falling under Art.106 TFEU: an example of

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automatically to games". However, the Commission also clarifies that "To the extent that the necessity of an aid scheme targeted at games which serve a cultural or educational purpose can be demonstrated, the Commission will apply the aid intensity criteria of this Communication by analogy".

[406] See for example SA. 46572 (2017/N) – Germany, *Bavarian games support measure*, SA.51820 (2018/N) – Germany, *North Rhine-Westphalian games support measure*, SA.55709 (2019/N) – Germany, *Support for video games in Baden-Württemberg*, SA. 54817 (2020/C), *Tax shelter aid scheme for videogame production*, SA.45735, *Scheme for the development, production and promotion of cultural and educational digital games*, SA.63373 (2021/N) - Italy, *Tax credit for the production of video games of 'Italian nationality' with cultural value*, SA.102047 (2022/N), *Tax credit for digital games*, SA.110639 (2023/N) – Germany, *Reintroduction of the North Rhine-Westphalian digital game support scheme.*

The relevance of the cultural test emerges even more clearly in cases such as SA.20324 – France*, Crédit d'impôt pour la creation de jeux video,* in which – before issuing the final positive decision – the Commission initiated a formal investigation procedure, and in which the presence of an adequate cultural test was then one of the elements leading the EC to adopt a positive decision.

[407] See European Commission, Communication to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions accompanying the Communication on "A single market for 21st century Europe" Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final, where it is affirmed that: "Services of general interest cover a broad range of activities, from the large network industries such as energy, telecommunications, transport, audiovisual broadcasting and postal services, to education, water supply, waste management, health and social services. These services are essential for the daily life of citizens and enterprises, and reflect Europe's model of society. They play a major role in ensuring social, economic and territorial cohesion throughout the Union and are vital for the sustainable development of the EU in terms of higher levels of employment, social inclusion, economic growth and environmental quality".

this possible link between cultural activities and SGEI are public service broadcasting activities, which can therefore benefit from the exception enshrined in Art.106(2), even though the Commission acknowledged the specificities of this sector by establishing specific rules for state aid to PSM in the so-called Broadcasting Communication, adopted in 2001[408] and amended in 2009[409]. This document, apart from establishing the conditions to fulfil in order to benefit from the SGEI derogation[410], also recalls the possibility of resorting to Art.107(3)(d), even though it is also specified that this provision would not be generally relevant[411], and that because of the need to interpret the cultural derogation strictly: for this reason the cultural goal has to be clearly identified or identifiable, the notion of culture must be applied to the content of the product in question, not to the medium or its distribution per se, and the promotion of culture has to be regarded as distinct from the educational and democratic needs of a Member State[412]. This approach followed by the Commission is exemplified by two decisions adopted in the late 1990s, after a period characterised by greater leniency and greater room left to Member State in identifying the remit of SGEI, such as *Phoenix/Kinderkanal*[413] and *BBC News 24*[414]. In both cases, the Commission adopted a narrow interpretation of culture, affirming the impossibility of resorting to the cultural derogation because of the fact that a divide could not be drawn between cultural aims and social and democratic ones. However, the Commission significantly did not resort to Art. 107(3)(d) neither in cases in which an operator was receiving state compensation for separate cultural obligation under a public service mandate, in which therefore such a divide could be traced[415], at times also questioning the Member State's choice to include innovative activities – such as the ones related to education – within the scope of public service broadcasting[416].

Given the lack of a definition of culture and the difficulty of separating cultural aims from social and democratic ones, closely intertwined to each other as also proven by the Amsterdam Protocol – the latter specifically addressing public

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[408] Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320, 15.11.2001, 5-11.

[409] Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257, 27.10.2009, 1-14.

[410] *Ibid.*, at 37. More specifically, the service in question must be a service of general economic interest (and clearly defined as such by the Member State), the undertaking carrying out the service must be expressly entrusted by the Member State with the provision of it and, lastly, the application of the state aid rules must concretely obstruct the performance of the service. At the same time, the exemption from these rules must not affect the development of trade to an extent which is contrary to the interests of the European Union (in coherence with the proportionality principle).

[411] *Ibid.*, at 34.

[412] *Ibid.*, at 35.

[413] Aid NN 70/1998 – Germany, *State aid to public broadcasting 'Kinderkanal and Phoenix'.*

[414] Aid NN 88/1998 – UK, *Financing of 24-hour advertising-free news channel out of the licence fee by the BBC.*

[415] Aid N 631/2001, *BBC licence fee.*

[416] Aid N 37/2003, *BBC Digital Curriculum.*

broadcasting and ensuring Member States' competence in this sector[417] – which considers the system as public broadcasting as directly related to the "democratic, social and cultural needs of each society", the approach followed by the Commission might end up being rather problematic: indeed, even though over the years Art.106(2) proved to be a solid basis for ensuring financing to PSM, at the same time the EC – in recent cases as well – does not seem keen to acknowledge the cultural dimension of it[418], neither in cases in which the need to safeguard cultural diversity is more prominent[419].

A similar approach can be found also found in the publishing sector, once more with regard to the alternative 107(3)(d) and Art.107(3)(c). As a general rule, in this field the compatibility of aid schemes to publishing activities are assessed by resorting to the cultural derogation, while when support to the press it at stake recourse is made to the industrial one. However, if Commission's decisions are analysed, this distinction appears to be not completely clear-cut.

Indeed, recourse to Art.107(3)(d) appears to be often linked to the existence of two elements: an easy detectable cultural nature of the supported activity and the need to safeguard minority languages and cultures.

With regard to the first, the Commission focused on the presence of an outstanding cultural value – to be verified by an *ad hoc* Evaluation Committee – and a limited commercial potential, which makes the public support fundamental for the publication itself[420].

Moving to the need to protect minority languages and culture, namely the *fil rouge* of some Commission's decisions not to raise objections on the basis of the cultural derogation[421], it appears worth underlining two different issues: first of all, given the

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[417] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States, OJ C 340, 10.11.1997, at 109.

[418] This point is also made by DONDERS, K., RAATS, T., *Cultural Diversity and State Aid to Public Service Media*, in PSYCHOGIOPOULOU, E., *Cultural Governance and the European Union.*, 132-148., at 147. The Authors also raise the question whether the notion of PSM as an exception, not a fundamental component of European democracies, is acceptable at all: if not, going beyond the exception status would require a strengthening of the European cultural competences in primary law, in this way disrupting what the division of competences between EU and Member States is now.

[419] See for example SA. 36672 (2013/NN) – France, *Financement de la société nationale de programme France Médias Monde – FMM.* Even though the promotion of cultural diversity is portrayed as one of the elements characterizing the public service mission of FMM ("L'article 1 du cahier des charges établit que "la société en charge de l'audiovisuel extérieur de la France a pour mission de contribuer au rayonnement de la France dans le monde, à la promotion de la langue française, des cultures française et francophone et plus largement à la diffusion de la diversité culturelle"), not only the compatibility of the compensation is assessed on the basis of Art. 106(2) TFEU without even mentioning the possibility of resorting to Art.107(3)(d), but also no reference to Art.167(4) is made.

[420] See e.g. State aid SA. 34138 (2012/N) – Spain, *Aid for publishing cultural magazines*, SA. 34328 (2012/N), Spain, *Subvenciones para la edición de libros*, SA. 43878 – Spain, *Aid for cultural periodicals.*

[421] See e.g. SA. 34168 (2012/N) – Spain, *Publishing aid for literature in the Basque country*, SA.60697 (2020/N) - Slovakia, *State aid scheme to support the culture of national minorities in Slovakia.*

unlikely possibility that such support measures could distort intra-EU trade – and that in the light of their local and therefore limited audience – , also the possibility of qualifying them as State aid might be questionable: nevertheless, the Commission seems to adopt a rather cautious approach, considering them as covered by Art.107 even if the affectation of internal trade is only potential[422].
Secondly, the aim of protecting and promoting a minority language or culture is not always enough to resort to Art.107(3)(d). An example can be considered an aid meant to support the Valencian language in the press in which, even though reference is made to Art.167(4) and to the consequent need to safeguard cultural diversity, the compatibility with the internal market is in the end assessed on the basis of the industrial derogation[423].
This approach can be on the one hand justified on the basis of the aforementioned tendency to resort to Art.107(3)(c) when support measures to the press are at stake – a tendency which might then overshadow the protection of minority culture –, but on the other hand it may be deemed as illustrative of the Commission being once more worried about Member Stated adopting industrial policy measures disguised as cultural policy ones. An indirect symptom of that may be also considered the fact that in the aforementioned Valencian case the Commission clarified how the support measure did not constitute state aid, but felt the urge to underline that, in case in was, its compatibility would have been assessed on the basis of Art.107(3)(c) in the light of the need to interpret the notion of culture restrictively[424].
This fear clearly emerges from cases such as the one related to two aid measures (interest rate subsidies on bank loans and tax credits) adopted by Italian government to support the publishing industry[425]. Here, the Commission, although aware of the relevance of cultural diversity in the European legal framework – reference was in particular made to Art. 167 TFEU, to a Council resolution to the Commission inviting the latter to take into account the cultural dimension of books, to another Council Resolution on language diversity, and to Art. 22 of the Charter of Fundamental rights of the European Union – in scrutinizing the support schemes distinguished between the promotion of the Italian culture and language and the support to the diffusion of publishing products in the Italian language, underlining that the measures adopted by the Italian government were only meant to achieve the second objective. Indeed, according to the Commission the schemes under

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[422] This emerges quite clearly in State aid N 542/05 – Slovak Republic, *Vydavetel'stvo spolku slovenskych spisovatel'ov s.r.o.* Individual aid in favour of weekly literature magazine, at point 10: "Even though the magazine is addressed to a limited circle of readers and there is a language barrier, one cannot exclude that there is a potential affectation of trade between Member States and therefore that the measure contains a potential aid element".
[423] SA.45512 (2016/N) – Spain, *Aid to support the Valencian language in the press.*
[424] *Ibid.*, at point 20.
[425] Commission decision of 30 June 2004 on the measures notified by Italy in favour of the publishing industry, OJ L 118, 3.5.2006, 8-17.

review were excessively broad, and assessing their compatibility with the internal market on the basis of Art.107(3)(d) would have resulted in giving an "unduly broad meaning" to culture[426]. Moreover, in responding to the Italian authorities' argument according to which the promotion of information pluralism pursued by the measures and the promotion of culture should have been read together, the Commission also recalled the need to keep separate the educational and democratic needs of a Member States and the backing of culture, recalling the principles already expressed in *Phoenix/Kinderkanal* and *BBC News 24*. A similar perspective was also adopted in a case related to a support scheme to the Flemish press, in which the Commission highlighted the need – in order to apply Art.107(3)(d) – to narrow the scope of the activities addressed by the measure in order to avoid supporting the means through which culture is conveyed instead of supporting cultural diversity itself[427].

In conclusion, when cultural industries are examined, different approaches – depending on the sector under analysis – can be noticed. More specifically, while in the audiovisual field the Commission seems more favorably disposed towards the possibility of resorting to the cultural exception – even when dealing with products which are lato sensu cultural such as videogames – public broadcasting and publishing activities show the Commission's attempt not to interpret the notion of culture too broadly. Behind this choice there is the willingness – as already underlined – to prevent Member States from pursuing not cultural aims by resorting to the cultural derogation: this might be useful in order not to devalue the latter, but at the same time some perplexities arise with regard to two different issues.

First of all, singling out the cultural nature of a measure might prove to be extremely complex, and that as a direct consequence of the blurred borders of the notion of culture itself. An indirect proof of that can be also considered the fact that, as previously pointed out, one of the amendments to the recent European Media Freedom Act – namely a measure promoting media pluralism and freedom – was specifically aiming at recalling Art. 167 TFEU, in order to underline the connection between media services and cultural expression[428], showing how for example

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426 *Ibid.*, at point 53.

427 State Aid N 74/2004 – Belgium, *Aide à la presse écrite flamande*. At point 20-21 it is more specifically affirmed that: "De fait, bien que l'article 151 du traité CE6 prévoie effectivement que la Communauté devrait contribuer à la diversité culturelle, la Commission estime que la mesure en cause ne vise pas principalement les produits de la presse culturelle ou les produits de la presse écrite couvrant la culture, mais soutient de façon plus générale les projets répondant aux objectifs mentionnés ci-dessus. La Commission note que le régime ne contient pas de dispositions relatives à l'attribution des ressources à des publications individuelles, au contenu des produits d'édition admissibles ou aux valeurs culturelles que les produits concernés devront couvrir ou promouvoir".

428 See the Amendments adopted by the European Parliament on 3 October 2023 on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU. The Parliament introduced a new Recital 1a, in which it is affirmed that "Media services are always either carriers of cultural forms of expression or directly represent a cultural

cultural and democratic interests might be tightly intertwined and not easily distinguishable from one another.
Also, exactly in the light of this uncertainty which is inherent to the notion of culture, it might be possibly considered as unrealistic the request addressed to Member States to provide clear and verifiable cultural justifications when submitting support schemes to the Commission: indeed, reaching an unambiguous[429] conclusion with regard to the cultural aim of the measure may turn up to be not easily practicable.
Secondly – and here reference is to the possible overlap with Art.107(3)(c) – the ongoing recourse to this provision, at times combined with Art. 167(4), in spite of the existence of an *ad hoc* cultural derogation, might arouse some perplexities.
Indeed, although in line with the Commission's aforementioned concerns about the Member States' attempts to pursue industrial policy objectives through it, this approach followed by the Commission presupposes the possibility of separating an effective cultural policy from a sound industrial fabric; this assumption might be somehow conflicting with the fact that, if culture creates positive externalities by stimulating the economy, this mechanism should work both ways, meaning that the same industry which cultural policies aim at strengthening need to be stable enough to sustain cultural policies themselves[430].

2.2.2 Public support to heritage conservation: compatible (but still aid)

Some kind of distrust towards the possibility of wholly acknowledging the specificities of the cultural sector can be also detected if aid schemes to support heritage conservation activities are addressed.
When dealing with the latter, the possibility of resorting to Art.107(3)(d) is generally accepted, but at the same time the Commission appears to be rather cautious in a phase that precedes the compatibility assessment: the phase in which the existence itself of a state aid has to be verified.
Moving to a brief analysis of the decisions adopted over the years, the EC seems indeed to be aware of the relevance of the activities related to the preservation of cultural heritage – to be considered as something benefitting all European citizens,

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form of expression themselves. This dual character must be respected throughout. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures".

[429] The need for the cultural support measure to contain references indicating that the aid scheme could be considered, in a clear and unequivocal manner, as favouring cultural products or cultural activities, was expressely recalled by the Commission in its decision adopted on case N 74/2004.

[430] The connection between industrial fabric and cultural diversity, being the former necessary to achieve the latter, was also recalled by the 2001 Council Resolution *National aid to the film and audiovisual industry* (see *supra*).

not only the ones belonging to that specific country issuing the support measure[431] –, and therefore decided to give the green light to a number of schemes aiming at safeguarding both cultural heritage sites mainly related to the Member State granting the aid and having a more "national" dimension[432] and more well-known ones, belonging in a more direct way to the common European heritage and more capable of crossing the national borders[433].

Yet, even though aid schemes are often considered as falling outside the state aid discipline, either because of their non-economic character or in the light of their merely local impact[434], some presumption that cultural support schemes automatically fall within Art.107(1) can also be detected in other decisions[435], even in cases in which the market concerned is a mainly national one. This emerges for example in a case aiming at fostering the development of Cypriot handicraft sector[436]: here the Commission, although acknowledging the limited effects on trade of such a measure – and that in the light of the fact that Cypriot traditional craftworks were sold mainly in Cyprus, with limited import and exports – asserted that the existence of an aid could not be entirely excluded.

The same kind of approach was followed in a case concerning the support to an open-air museum in the Czech Republic, which also sheds light on an issue which will be dealt with in greater detail later, namely the concept of substitutability applied to cultural activities and products. In this decision[437], the Commission, when assessing the compatibility with the market of a measure aiming at safeguarding and promoting regional culture through the renovation of an historic farm building to be used as a museum, as an eco-pavilion and as a training centre for schools, admitted that the potential to distort competition was rather low, in the light of both the distance with similar structures and the peculiar nature of the project financed, but in the end decided to adopt a cautious approach. More specifically, it stated that – even though a very limited distortion of the competition ("if any") could be expected –, it was not possible to exclude that the funding for the museum might

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[431] See for example the case N 568/2009 – Poland, *Aid measure with a cultural objective under the Regional Development Operational Programme "Innovative Economy"*. At point 39 heritage conservation was defined as a "recognized area of mutual benefit for all European citizens under Article 167 TFEU", as a "sphere providing benefits to all European residents who will have access to the preserved cultural heritage relating to the community's collective memory".

[432] See e.g. N 471/2008 – Slovenia, *Lipica Horses.*

[433] See for example the case N 275/2010 – Austria, *Indemnity guarantee for Albertina exhibition*, related to an exhibition about Michelangelo. Here the Commission affirmed that the exhibit was "of outstanding significance for the European cultural heritage" (at point 3).

[434] These two elements will be analysed later.

[435] This is also underlined by FERRI, D., *Cultural Diversity and State Aids to the Cultural Sector*, in PSYCHOGIOPOULOU, E., *Cultural Governance and the European Union*, cit., 119-131, at 127. More specifically, the Author qualifies the Commission's approach as an 'interventionist' one.

[436] SA. 34906 (2012/N) – Cyprus, *Development of Cyprus handicraft.*

[437] N-SA. 33433 – Czech Republic, *Green Knowledge Centre/Open-air museum. Town of Bystrice nad Pernstejnem.*

"in some way, and to a very limited degree" affect cross-border trade. Interestingly, the Commission also underlined that an assessment of the possibility of applying Art.107(1) was not necessary, and that in light of the fact that the measure under analysis would have been in any event declared compatible through Art.107(3)(d), therefore greatly reducing the scope of the non-state aid measures and reaffirming, in even clearer terms, the presumption of applicability of Art. 107(1). In this way, the Commission did not properly address specific features of cultural activities, such as non-substitutability[438], and assumed the applicability of the State aid discipline without carrying out a prior case-by-case verification of the existence of an undertaking, at times without neither discerning which recipients of the same grant were economic in nature and which on the contrary were not[439].

This approach might be considered as revealing of the double-sided nature of the cultural derogation: if, on the one hand, this provision might be considered as an effective *pendant* to Art.167 TFEU, on the other hand it also helps the Commission to retain control on the Member States' measures aiming to support the cultural sector, by leaving the concrete extension of the State aid discipline untouched and merely providing for an express compatibility clause of these measures with the internal market[440], without properly exempting them from the application of

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[438] On substitutability see for example SA. 38391 – Estonia, *State compensation of damage incurred by an owner of an international exhibition*. At point 29 it is stated that "In that respect one important element is whether some kind of competition exists, i.e. if there are other entities offering the same or substitutable goods and services. If a market, however limited, exists for the activity concerned then the activity is organised on market principles and it is to be considered economic. In the context of the case at hand, other operators than the beneficiaries of the measure, like for example, municipal museums, exhibition agencies or private initiatives may offer similar and substitutable services of organizing international exhibitions, confirming the existence of a market". No reference is made to the concrete possibility of interchangeability of cultural activities (an issue which will be addressed by the 2016 Notice, as it will be see later).

[439] See e.g. SA. 34462 – Latvia, *Program "Culture"*. At point 50 it is indeed affirmed that "The beneficiaries get an advantage through the measure, since they would not receive the direct grants, dividends or tax reliefs under normal market conditions. However, certain beneficiaries may not be considered as undertakings within the meaning of Article 107(1) of the TFEU, as they do not carry out an economic activity, which consists in offering goods or services on a given market. Other beneficiaries whose activities include commercial exploitation are likely to qualify as undertakings as confirmed by the Commission in previous decisions on aid to culture and heritage21. Therefore, in the case of a programme covering both undertakings and other beneficiaries, the Commission cannot exclude that an economic advantage is provided to undertakings". At the same time, up to a certain extent in opposition to that, at point 59 it is stated that "The Commission accepts the view of the Latvian authorities that the promotion of activities covered by the measure is necessary for achieving the objective of culture and heritage conservation. Most cultural activities supported under this scheme are not profit-seeking and revenues often do not cover the costs related to such activities. The beneficiaries targeted by the scheme are mostly institutions lacking capital, for which the resources provided by State aid are indispensable". Probably, if most of the recipients could not be qualified as undertakings, opting for a different approach might have been better.

[440] This might be also linked, in more general terms, to the twofold nature of the introduction of culture into the Treaty in the perspective adopted by IANUS, R, ORZAN, M.F., *Aid Subject to a Discretionary Assessment under Article 107(3) TFEU*, in HOFMANN, H.C., MICHEAU, C. (eds), *State Aid Law of the European Union*, Oxford, Oxford University Press, 2016. According to the Authors, the

Art.107(1). After all, as previously recalled, that was also the solution adopted before the Maastricht Treaty, although at that time reference was made to a different derogation, namely the industrial one.

3. Streamlining cultural considerations in state aid discipline: the 2014 General Block Exempt Regulation and the presumption of State aid's existence

3.1 The GBER: between (theoretically) non-aid and (practically) compatible aid

Thus, the Commission – in spite of a certain skepticism towards the use of Art.107(3)(d) in some cultural industries and in spite also of the tendency to qualify as state aid support measures not deemed to necessarily impact on intra-EU trade – proved to be overall well-disposed towards Members States' support measures to the cultural sector.

In addition to this, a more effective integration of cultural considerations within State aid law was ensured by the adoption of the General Block Exempt Regulation (GBER) of 2014. Building upon 109 TFEU – according to which the Council, following a proposal of the Commission and after consulting the European Parliament, may adopt any appropriate regulations for the application of Artt. 107 and 108, in order in particular to determine the conditions in which Art. 108(3), namely the notification duty, shall apply – the Council adopted Regulation 994/98[441], empowering the Commission to adopt individual regulations declaring specific categories of aid lawful and exempt from the prior notification's obligation. Over the years, a number of regulations have been issued in order to provide exemptions for certain categories of aid and then in 2014 – in the context of the State aid modernisation reform, aiming at promoting economic growth and concentrating approval procedures on cases having the biggest impact on the internal market, at the same time streamlining rules and ensuring faster decisions[442] – the aforementioned GBER was adopted, and still nowadays represents, together

introduction of Art.167 may be considered either as a "tool to defend national identities", also implementing the subsidiarity principle, or as an "attempt by the Union to gradually reduce Member States' sovereignty" (at 301).

[441] This is the first so-called "Enabling Regulation" (Council Regulation No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 142, 14.5.1998, 1-4), now repealed and replaced by Council Regulation EU 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid, OJ L 248, 24.9.2015, 1-8.

[442] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in the application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, 1.

with the De Minimis Regulation[443] – the latter exempting aid schemes of small amount, deemed to have no impact on the internal market, from State aid control – an instrument capable of simplifying the control on public support measures.

In this latest version of the GBER adopted in 2014, specific provisions on the cultural sector were introduced. More specifically, provided that the general conditions established by the first chapter of the Regulations must be always respected, aid could be granted both specifically to audiovisual works[444] and to a wide range of cultural purposes and activities, enlisted in Art. 53[445],, which could potentially cover the whole cultural spectrum[446]. At the same time, recital 72 specifies that, in the culture and heritage sector, the measures adopted by the Member States may not constitute aid, and that because they do not fulfil the criteria set by Art.107(1), for example because intra EU-trade is not affected or because the activity is not economic. Aware of the dual nature of cultural products, the Commission also tries to draw a line between cultural-commercial an "pure" cultural activities: in the same recital it is affirmed that, if on the one hand "cultural

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[443] The *de minimis* was first introduced in a Notice published in 1996 (Commission Notice on the *de minimis* rule for State aid, OJ C 68, 6.3.1996, 9) and then later established by the Commission Regulation (EC) No 69/2001 of 12 January 2001 non the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ L 10, 13.1.2001, 30. The latest version, aiming at increasing the ceiling of *de minimis* aid which a single undertaking may receive per Member State over any period of 3 months in order to reflect the inflation, entered into force in January 2024, is the Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 2831, 15.12.2023.

[444] See Art. 54, which covers the whole audiovisual product's lifecycle, from script-writing to distribution and promotion, and also specifies that aid schemes shall support cultural products. To this purpose, in coherence with the 2013 Cinema Communication, the same provision requires Member States to establish effective processes, capable of avoiding manifest errors in qualifying a product as cultural.

[445] More specifically, Art. 53 is entitled "Aid for culture and heritage conservation". To clarify the concrete scope of the "cultural and natural heritage" concept it is possible to resort to the guidelines provided by the Commission in the Frequently Asked Questions published in March 2016. Here it is specified that "GBER does not define such recognition procedure as this does not fall within the remit of the European institutions. Therefore, it is for the concerned Member State to decide which projects or activities can be declared as cultural or natural heritage. As soon as that project or activity is formally recognized as cultural or natural heritage by a competent public authority of this Member State, the condition for application of Article 53 would be deemed to be fulfilled".

[446] More specifically, the second paragraph of Art.53 makes reference to: "museums, archives, libraries, artistic and cultural centres or spaces, theatres, opera houses, concert halls, other live performance organisations, film heritage institutions and other similar artistic and cultural infrastructures, organisations and institutions; tangible heritage including all forms of movable or immovable cultural heritage and archaeological sites, monuments, historical sites and buildings; natural heritage linked to cultural heritage or if formally recognized as cultural or natural heritage by the competent public authorities of a Member State; intangible heritage in any form, including folklorist customs and crafts; art or cultural events and performances, festivals, exhibitions and other similar cultural activities; cultural and artistic education activities as well as promotion of the understanding of the importance of protection and promotion of the diversity of cultural expressions through educational and greater public awareness programs, including with the use of new technologies; writing, editing, production, distribution, digitisation and publishing of music and literature, including translations".

institutions and projects do not typically give rise to any significant distortion of competition", on the other hand it is specified that "activities which, although they may present a cultural aspect, have a predominantly commercial character because of the higher potential for competition distortions, such as press and magazines (written or electronic), should not be covered", as well as commercial activities such as fashion, design or videogames". Apart from the perplexing reference to videogames – which, as already underlined, have been considered by the Commission also as vehicles of cultural values, not only as "neutral" products – there is an aspect which appears worth pointing out, namely the potential contrast between Art.53 and Recital 72. Indeed, even though the latter recalls the need to distinguish between economic and non-economic activities, acknowledging as a consequence the possibility that aid schemes may fall outside the scope of Art.107(1), Art.53, through its all-encompassing list, seems to ignore this option, by qualifying an extremely wide range of measures – regardless of their actual impact on intra-EU trade and of their economic or non-economic character – as State aid, although compatible[447].

3.2 The example of cultural infrastructure and the attempt to avoid a State aid's existence presumption

This choice appears to be first of all revealing about the already discussed complexity of separating economic and non-economic activities: indeed, though aware of the potential non-economic character of the activities carried out in the cultural field, the Commission seems to follow in the GBER a rather cautious approach, to some extent similar to the line followed in concrete State aid cases in which the mere potential to distort trade led at times to the extension of the scope of Art.107(1). This complexity clearly emerges when infrastructural projects are at stake: indeed, if the *Infrastructure Analytical Grid for Culture, Heritage and Nature Conservation*[448] – adopted after the well-known *Leipzig-Halle* case[449] – is examined, the need to distinguish between the infrastructures supported through public funding and the activities carried out through them is clear, and the economic or non-economic character appears to be linked to the commercial or cultural nature of the activities themselves. Indeed, even though "the public funding of cultural infrastructure is in principle not subject to State aid rules", being cultural activities

[447] This is also highlighted by BALDI, C.E., *Il finanziamento del patrimonio e delle attività culturali. Come evitare le insidie delle regole europee*, in *Aedon*, 2015, no.2.

[448] Working document prepared by the services of the European Commission for information purposes available here.

[449] Case C-288/11 P, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v. Commission*, ECLI:EU:C:2012:821. In this ruling was exposed the principle according to which, in case of impossibility of separating the infrastructure from the economic activity carried out through it, the infrastructure itself should be considered as economic.

“non-economic in nature”[450], it is also possible that – through a commercial exploitation of the infrastructure itself – an economic character might also emerge. In this case, the public funding will fall within the scope of State aid discipline only insofar as it compensate the costs linked to the economic activities, given that, however, the Member State shall ensure that the public funding provided for the support of non-economic activities will not be used to cross-subsidise the economic ones: to this purpose, support will be limited to the net cost of the non-economic activities, which will be identified on the basis of a clear separation of accounts[451]. This method was for example followed by the Commission in a case regarding a Hungarian support scheme to promote tourism, in which part of the grant was not considered as falling within Art.107(1) because of the non-economic nature of the beneficiaries (such as for example non-profit organizations) while, with regard to financed projects in which the funding on the other hand constituted State aid, Art.107(3)(d) was employed to declare their compatibility with the internal market[452]. In this way, the *Analytical Grid* offers a solution to tackle the issue of cultural infrastructure “mixed nature” without automatically subjecting them to the State aid discipline, taking into account their specificities without at the same time jeopardizing the integrity of the internal market.

Interestingly, the same document also deals with the potential effects on trade, by affirming that, even in those cases in which economic in nature activities are performed through a cultural infrastructure (also in the case of customary amenities such as cafes, shops or paid cloakrooms), public support frequently has no effect on trade, and that because of the marginal effect on touristic fluxes from other Member States and on cross-border investments or establishment[453]: in other words, even in those cases in which an economic nature is virtually detectable, Art.107(1) should not be automatically applied.

In the light of the aforementioned, the disconnection between theory (GBER) and praxis (*Analytical Grid*) appears to be rather relevant.

4. The 2014 public consultation on the notion on state aid: requests for clarification

The need to take into account cultural specificities in State aid discipline, especially when determining the scope of the latter, emerges also from the public consultation on the notion of State aid which took place in 2014 and through which Member States – in coherence with Art. 15 TFEU and the openness of decision

[450] *Ibid.*, at point 3.
[451] *Ibid.*, at point 11.
[452] State aid No N 39/2010 – Hungary, Cultural Heritage Scheme to Promote Tourism.
[453] *Analytical Grid*, at point 15.

making promoted by it[454] – and had the chance to submit some comments and observations to a draft Commission Notice on the notion of State aid[455], namely an instrument aiming to contribute to "an easier, more transparent and more consistent application of this notion across Europe"[456], contributing to the overall goals of the State aid modernisation. Through this tool, the Commission informed the various stakeholders of the way it planned to interpret Art. 107(1), raising some doubts because of the limited discretion enjoyed by it in applying this provision[457].

A clarification of the divide between economic and non-economic activities, and therefore of the notion of undertaking, can be considered as a *fil rouge* of the various comments submitted by the Commission[458]: indeed, such an elucidation appears to be in order to avoid interpretive uncertainty and not to make Art. 107(1) a "boundless" provision[459], but also to ensure a uniform application of competition law as a whole across Member States[460]. Always in the light of the need to clarify the

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454 According to para.1 of this provision: "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible". As underlined by CURTIN, D., HOFMANN, H., MENDES, J., *Constitutionalising EU Executive Rule-Making Procedure: A Research Agenda*, in *European Law Journal*, 2013, vol. 19, issue 1, 1-21, openness is related not only to access to information but also to the possibility for the citizens to "monitor and influence legislative and executive processes through access to information and access to decision-making arenas".

455 The comments submitted to the Commission were no longer available on the Commission's website when the present work was drafted: for this reason, they were directly required to the Directorate-General for Competition.

456 See para. 1 of the Notice draft. More in general, on the role of guidelines such as the ones contained in this Notice in State aid discipline, see RAWLINSON, F., *The role of policy frameworks, codes and guidelines in the control of State aid*, in HARDEN, I. (ed.), *State aid: community law and policy*, Bundesanzeiger, 1993.

457 This point is made by BIONDI, A., STEFAN, O., *The Notice on the Notion of State Aid: Every Light Has Its Shadow*, in NASCIMBENE, B., DI PASCALE, A. (eds), *The Modernisation of State Aid for Economic and Social Development*, Berlin, Springer, 2018, 43-61, at 50.

458 See e.g. the *Response to the Consultation on the Notice on the Notion of State Aid_HT.3639 – Notion of Aid*, submitted by the Istituto Bruno Leoni (Italy), underlining the lack of a clear definition of undertaking, directly related to the interpretative issues surrounding the concept of economic activity and also offering a tentative definition of the latter ("We suggest an operational, unambiguous definition of what an economic activity (*prima facie*) is: An economic activity is any activity that can be provided under competitive conditions (with regard to both competition in the field and competition *for* the field); in its turn, an activity should be considered as an economic activity if a competitive setting legitimately exists, and is not under Antitrust or other disputes at the EU level, at least in one member State").

459 This is the point made by the European Competition Lawyers Forum (UK) in its *Response to the European Commission Consultation on the Draft Notice on the Notion of State Aid* with specific regard to the in-house activities, not to be included – in the submitters' perspective – to State aid control.

460 Indeed, provided that, in explaining the distinction between economic and non-economic activities, the Court of justice consistently held that "any activity consisting in offering goods and services on a market is an economic activity", point 13 of the draft affirmed that "The question whether a market exists for certain goods and services may depend on the way those services are organised in the Member State concerned and may thus vary from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given activity can change over time". With regard to this, in its *Comments on the Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU*, 14.3.2014, the Centre of European Law of the King's

scope of state aid discipline, another recurring request submitted by Member States is about the interpretation of the concept of effect on trade and competition[461]. Indeed, the latter appears to be at times presumed, as underlined for example by French authorities[462] that, also recalling points 190[463] and 191[464] of the draft Notice, more specifically affirm that the effect on intra-EU trade is examined only when the compatibility with the internal market of a measure is assessed. In opposition to this alleged presumption, a systematic exam of the effects on the internal market, starting from the stage in which a measure is classified as State aid or not, is required, also in order to speed up the decision-making process of Art.108 TFEU, in coherence with the goals pursued by the State aid modernisation.

The little attention paid to this aspect was also underlined in other documents submitted for the consultation, such as the one drafted by the SEO Amsterdam Economics, namely a Dutch independent research institute[465]: here, after another call to clarify the distinction between economic and non-economic, the focus moves to an alleged overlap between the distortion of competition criterion and the ones of selectivity and advantage, which are – in the institute's perspective – equalized one another. For this reason, guidance by the Commission is requested, and cost-benefit analysis is interestingly suggested as instrument for assessing the concrete effect of State aid on the internal market, indirectly showing once more the potential tension between Member States' policies and safeguard of competition[466].

College London, by recalling the *Höfner* ruling, affirmed that the latter suggests the opposite interpretation, and that in the light of the need to interpret the notion of economic activity in the same way in all Member States.

461 However, the effect on trade and the distortion of competition, even though closely related to each other – indeed, the affectation of trade directly depends on the existence of an effective competition between undertakings in different Member States, as underlined by the CJEU in case C-73/03, Spain v. Commission, EU:C:2004:711, at para. 29, where it was stated that "Quant à l'incidence sur les échanges entre États membres, celle-ci dépend de l'existence d'une concurrence effective entre les entreprises établies dans ces États dans le domaine considéré" – should be kept separated.

462 See the *Note pour la Commission Européenne, Projet de communication sur la notion d'aide d'État – Demandes de précisions des autorités françaises*, 31.3.2014.

463 "Public support is liable to distort competition even if does not help the recipient undertaking to expand and gain market shares. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided. In this context, for aid to be presumed to distort competition, it is normally considered sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day- to-day business operation".

464 "An advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to distort competition and also be liable to affect trade between Member States".

465 See the *Contribution to the draft Commission notice on the notion of State aid pursuant to Article 107(1) TFEU*, 17.03.2014.

466 *Ibid.*, at 2, it is stated that "Since competition is not a goal itself, but a means to reach a high social welfare, social cost-benefit analysis could be an appropriate tool for assessing the effect of state aid. Applying social cost-benefit analysis to state aid would imply a broad definition of the criterion of 'distortion of competition'. Such a broad definition is preferable over an approach in

However, in addition these aspects which are dealt with in many of the comments submitted to the Commission, also the cultural sector appears to be at times among the concerns expressed by the Member States', stressing the need to make reference to them in order to take into account their specificities and to clarify their treatment according to State aid law, especially to untie the knot of their economic or non-economic nature[467].

Besides comments aiming at recalling the characteristics of the cultural sector and the values conveyed through it, which cannot be encompassed by the competitive market economy and should therefore be considered as non-economic[468], other

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which is distortion of competition is equalized to selectivity and advantage. In case a selective aid measure that provides an advantage to the recipient firm is considered to distort competition, one takes the risk that aid measures that have a net positive effect on social welfare are prohibited and that aid measures that reduce social welfare are accepted".

[467] Indeed, as affirmed by the Norwegian Government (see *HT 3639 Consultation on the draft notice on the notion of State aid – comments from the Norwegian government*, 14.03.2014), it might be surprising for many local authorities that aid for cultural activities might fall under the State aid discipline. Therefore, it would be useful to include a specific chapter devoted to them in the Notice, in order to provide some guidance on to what extent cultural activities should be considered economic.

Another example can be considered the comment submitted by the Danish Ministry of Business and growth. In its comment, the latter – hoping for a specific chapter devoted to State aid in the cultural sector – recalled the dual nature of cultural activities, directly contributing to the uncertainty surrounding the distinction between economic and non-economic activities, an uncertainty directly jeopardising the promotion of arts and culture ("it should be noted that areas characterized by mainly economic activities, such as architecture and design, also represent artistic and cultural aspects and thus, in some cases, serve cultural and artistic purposes. In practical terms, such uncertainty and lack of assessment criteria cause concerns, given that aid for culture, cultural heritage and sport is fundamental to the safeguarding and development of Danish art, culture and sport. The situation will not only affect the cultural and artistic sector but citizens in general who, as a result, could be faced with limitations in their access to art and culture. The area of culture as well as sport, seen in a broad perspective, covers a wide range of activities which serve both cultural and economic purposes. An increasing number of cultural activities are without doubt predominantly commercial operating on a market and this is reflected in the recent focus on the economic potential of the cultural and creative industries. However, a large number of cultural and artistic activities, as well as sporting activities, remain predominantly non-commercial and serve important essential purposes to society; such as promoting cultural and linguistic diversity, education, enlightenment, social participation, empowerment, cohesion etc. The dual nature of culture being on the one hand an economic good and on the other hand a vehicle of identities, values and meanings should be taken into account in connection with State aid. The same goes for the area of amateur sport which is based on voluntary activity").

[468] See the contribution by the UFISC (Union Fédéral d'Intervention des Structures Culturelles), namely a federation bringing together fifteen employers' organisations in the field of arts and culture: here, with specific regard to the Services of General Interest, it is stated that: "Les définitions extensives de l'économie de marché concurrentiel qui tendent à englober l'ensemble des formes économiques et la totalité des activités humaines sont une difficulté majeure car elle posent un véritable problème de contresens dans la considération des aides d'État. L'économie est plurielle. Elle associe économie de marché, économie redistributive et économie sociale et solidaire, qui répondent à des enjeux et des logiques d'organisation spécifiques. Il nous parait en particulier essentiel de consolider l'économie privée non lucrative, qui s'appuie sur des valeurs de non redistribution des bénéfices, de finalité du projet (le plus souvent d'intérêt général), et d'une gouvernance partagée et démocratique (un homme, une voix)[…] Il est fondamental de prendre en compte largement les services non économiques. Notamment, le champ artistique et culturel

comments adopt what can be deemed as a more "pragmatic" approach, in the attempt to stress the specific points of friction between state aid discipline and specificities of the cultural sector.

This kind of method can be for example detected in the comment submitted by Italian authorities[469]. After having expressed some perplexities about the practical usefulness of the Notice, in the light of the difficulty to apply the same rules to sectors extremely different from one another, the Italian State addresses the cultural sector already in the second paragraph of its comment, introducing its reflections on the merits of the Notice itself. More specifically, right after the usual request for clarifications on the distinction between economic and non-economic activities, when referring to measures aiming at stimulating cultural objectives and activities it is explicitly stated that it is not deemed possible to consider as existing the exercise of an economic activity in sectors such as the management of museums, archives, libraries or archeological sites. Indeed, these activities are characterised by a peculiar aim, namely the conservation of cultural heritage, the public enjoyment of the whole community, and the exercise of a public function of the State. Thus, even though at times some aspects of economic nature might arise from the payment of a ticket, the revenues derived from it only cover a small part of the operating costs, while the major part is covered by the general taxation, being the exercise of cultural activities inspired by criteria which are similar to solidarity mechanisms. In other words, the concept of State prerogatives which, as previously underlined, has been used to exclude the application of competition provisions[470], is here interpreted in a substantial way, by referring to activities not traditionally considered as belonging to State sovereignty but nevertheless connected to a public function[471], and this

constitue en soi un secteur spécifique de construction des personnes et du vivre-ensemble. La diversité culturelle ne peut alors se restreindre à un marché de services culturels, faut-il public, et les droits culturels, partie intégrante des droits de l'Homme, ne peuvent se résumer à ceux de consommateur. La diversité culturelle prend forme à travers le caractère original et pluriel des identités des groupes et des individus. Elle se construit dans une relation dynamique entre sociétés et territoires. [...] Parce que la culture est ce bien commun fondamentalement non marchand et non concurrentiel, les activités et initiatives artistiques et culturelles d'intérêt général s'affirment d'abord comme un champ spécifique aux caractéristiques non lucratives et non concurrentielles. Cette nature a commencé à être prise en compte, puisque la commission rappelle que l'article 167 du traité reconnaît l'importance de la promotion de la culture et prévoit que l'Union respecte et promeut la diversité culturelle. La commission reconnait d'ailleurs la nature de la culture, comme vecteur d'identités, de valeurs et d'opinions qui sont à la fois le reflet et le ciment de nos sociétés. Notamment au sein du projet de règlement d'exemption par catégories qui est un premier pas attendu vers la reconnaissance de la culture comme enjeu sociétal et d'intérêt général".

[469] See *Posizione delle autorità italiane concernente la consultazione pubblica sul progetto di comunicazione della Commissione sulla nozione di aiuto di Stato ai sensi dell'art. 107, paragrafo 1, del* TFUE, 31.3.2014.

[470] See par. 1 of this chapter.

[471] The same approach is also followed by the Danish Ministry of Transport (see *Comments to "Draft Commission Notice on the notion State aid pursuant to Article 107(1) TFEU and "Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest"*, 28.2.2014). After having stressed that the Member States should be able to undertake general public interest activities – in the exercise of public powers – without being subject to

perspective is also confirmed by the request made by Italian authorities to clarify whether the list of public powers offered at point 18 of the draft Notice[472] should be considered exhaustive: at any rate, the inclusion in the list itself of activities related both to the protection of the environment and to the protection and the enhancement of the artistic, cultural and landscape heritage – carried out by the State in order to ensure public enjoyment at the best conditions – is requested.
Also, cultural activities are addressed in the section devoted to State aid to infrastructures: here, without prejudice to the considerations on the non-aid character of the activities of protection, valorisation and dissemination of cultural heritage, should the existence of state aid be assessed in relation to cultural infrastructure, it is recalled that at point 197 of the draft it is argued that museums and cultural infrastructure do not have a distorting effect (and therefore do not constitute aid) where they "hardly attract visitors from other Member States". However, in case of proven presence of foreign visitors, it is not clarified how the threshold of relevance of the presence of foreigners should be identified. In conclusion, the focus of the Italian authorities is on two of the most discussed features of State aid to the cultural sector – namely the non-economic nature of the activities supported and their impact on intra-EU trade –, which still nowadays are at the core of the debate on the integration of cultural specificities in the State aid discipline.

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unnecessary State aid control, the Ministry reasserted the need for a clear demarcation between these activities – considered as non-economic – and economic ones. With regard to this, it also asked to clarify which activities should be covered by the term "exercise of public powers", when should a publicly financed infrastructures be considered as subject to commercial exploitation and, lastly, whether the term "exercise of public powers" should not be replaced by the term "exercise of public interest activities", once more adopting a substantial perspective on this issue. In this respect, and in line with the observations submitted by the Italian authorities, the Ministry also shed light on the need for a discussion on the relevance of financing through user fees.

[472] "It follows from the case-law that Article 107 TFEU does not apply where the State acts "by exercising public power" or where public entities act "in their capacity as public authorities". An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject. Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples are activities related to: a) the army or the police; (b) air navigation safety and control; (c) maritime traffic control and safety; (d) anti-pollution surveillance; (e) the organisation, financing and enforcement of prison sentences; and (f) the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data.
In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers, that entity, in relation to that activity, acts as an undertaking. On the contrary, if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking.

5. The 2016 Commission Notice on the notion of State aid

Building upon the 2014 draft and following the feedback received from Member States, in 2016 the Commission adopted the Notice on the notion of State aid[473] – namely a soft law instrument, not legally binding according to the Treaty but nevertheless capable of producing practical and legal effects[474] – containing a specific provision on culture and heritage conservation activities, which were on the contrary lacking in the draft[475], titled "Culture and heritage conservation, including nature conservation".

More specifically, section 2.6 – after a general introduction briefly recalling the specificities of the cultural sector and the potential all-encompassing scope of it[476] – aims to clarify the distinction between economic and non-economic activities.

With regard to the first category, it is affirmed that, in the light of their particular nature:

> "certain activities related to culture, heritage and nature conservation may be organised in a non-commercial way and thus be non-economic in nature. Public funding thereof may therefore not constitute State aid. The Commission considers that public funding of a cultural or heritage conservation activity accessible to the general public free of charge fulfils a purely social and cultural purpose which is non-economic in nature. In the same vein, the fact that visitors of a cultural institution or participants in a cultural or heritage conservation activity, including nature conservation, open to the general public are required to pay a monetary contribution that only covers a fraction of the

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473 *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, OJ C 262, 19.7.2016, 1.

474 See SNYDER, F., *The effectiveness of European community law: institutions, processes, tools and techniques*, in DAINTITH, T. (ed.), *Implementing EC law in the United Kingdom: structures for indirect rule*, Hoboken, Wiley, 1995, at 64.

475 Indeed, in the draft a reference to cultural activities was only present at point 30, where the non-economic nature of public education was extended to certain cultural services such as public libraries, and at point 197, listing specific cultural events and products among the examples of cases in which the Commission found that public support was not liable affect trade between Member States. More specifically, reference was made at lett. (b) to "cultural events and entities performing economic activities which however are unlikely to attract users or visitors away from similar offers in other Member States; the Commission considers that only funding granted to large and renowned cultural institutions and events in a Member State which are widely promoted outside their home region has the potential to affect trade between Member States" and, at lett. (d), to "news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience".

476 "Culture is a vehicle of identities, values and meanings that mirror and shape the Union's societies. The area of culture and heritage conservation covers a vast array of purposes and activities, inter alia, museums, archives, libraries, artistic and cultural centres or spaces, theatres, opera houses, concert halls, archaeological sites, monuments, historical sites and buildings, traditional customs and crafts, festivals and exhibitions, as well as cultural and artistic education activities. Europe's rich natural heritage, including conservation of biodiversity, habitats and species further provides valuable benefits for societies in the Union", at point 33.

true costs does not alter the non-economic nature of that activity, as it cannot be considered genuine remuneration for the service provided" (at point 34)

Summarising, the requirements that an activity has to fulfil in order to be qualified as non-economic are the non-commercial organisation and the presence of a pure social and cultural purpose, normally mirrored by the lack of charge applied to the users but at the same time capable of coexisting with the payment of a contribution covering only a fraction of the true costs. Also, point 36 makes reference to the objective non-substitutability characterising many cultural or heritage conservation activities (the example of public archives keeping unique documents is made), which excludes the existence of a genuine market: also under these circumstances, the activities would qualify as non-economic.
In contraposition to that:

> "[…] cultural or heritage conservation activities (including nature conservation) predominantly financed by visitor or user fees or by other commercial means (for example, commercial exhibitions, cinemas, commercial music performances and festivals and arts schools predominantly financed from tuition fees) should be qualified as economic in nature. Similarly, heritage conservation or cultural activities benefitting exclusively certain undertakings rather than the general public (for example, the restoration of a historical building used by a private company) should normally be qualified as economic in nature" (at paragraph 35)

Thus, with regard to the way of funding, a marked divide is drawn between contributions covering only a fraction of the costs (in this case, the activity will be qualified as non-economic) and fees on the contrary predominantly financing – possibly also together with other commercial means – the activity under exam (which will be considered as economic). This distinction, in the Commission's perspective, is also mirrored by the different goal pursued by the financed activity: while in the first case a pure social and cultural aim is recalled, there is no such reference in the second case, and this lack of a "public mission" can be also indirectly confirmed by the attempt to link the non-economic character to the merely private benefit which could be obtained through the enjoyment of the supported activity.

Apart from the general distinction between economic and non-economic activities, the Notice – in coherence with the aforementioned *Analytical Grid* – at paragraph 37 also addressed the potential issues arising from their possible coexistence: in this case, the public funding will fall under the State aid discipline only to the degree that it covers the costs linked to the economic activities[477].
In the footnote related to paragraph 37, the Commission also refers to the possible affectation of trade deriving from these mixed economic and economic, by affirming

[477] See para. 37.

that normally customary amenities provided in the context of a non-economic activity[478].

Together with paragraph 197 – the latter already present in the draft and listing cultural events and entities among the cases in which public support is considered to be not liable to affect intra-EU trade – this is the only reference within the Notice to the impact on trade of cultural activities. No further explanation was provided by the Commission, even though the need for a more in-depth analysis was also underlined in some of the comments submitted for the public consultation on the notion of State aid in 2014.

6. The impact of the Notice on the Commission's decisional practice

After this general overview of the Notice's contents, the focus will be now on the influence of the Notice on the Commission's decisional practice after 2016. First of all, a clarification on the binding nature of these guidelines is needed. Without delving into the broad debate surrounding the effects of soft law instruments such as the one at stake[479], it appears worth recalling that the notion provided by the Commission produces legally binding effects for the latter[480], also in coherence with the jurisprudence of the CJEU, according to which the Commission, when adopting soft law, limits the exercise of its own discretion and

[478] Indeed, footnote 50 states that: "As explained in paragraph 207, the Commission considers that public financing provided to customary amenities (such as restaurants, shops or paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between Member States. Similarly, the Commission considers that public financing to customary amenities that are provided in the context of non-economic culture and heritage conservation activities (for instance, a shop, bar, or paid cloakroom in a museum) normally has no effect on trade between Member States".

The recalled paragraph 207 provided that: "If, in cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, the Commission considers that its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, that is to say an activity which is directly related to and necessary for the operation of the infrastructure, or intrinsically linked to its main non-economic use. This should be considered to be the case when the economic activities consume the same inputs as the primary non-economic activities, for example material, equipment, labour or fixed capital. Ancillary economic activities must remain limited in scope, as regards the capacity of the infrastructure. Examples of such ancillary economic activities may include a research organisation occasionally renting out its equipment and laboratories to industrial partners. The Commission also considers that public financing provided to customary amenities (such as restaurants, shops or paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between Member States since those customary amenities are unlikely to attract customers from other Member States and their financing is unlikely to have a more than marginal effect on cross-border investment or establishment".

[479] On this topic see, among others, LÁNCOS L.P. *et al.* (eds), *The Legal Effects of EU Soft Law*, Edward Elgar, 2023, DE WITTE, B., *Soft law in European public law*, in ELIANTONIO, M. *et al.*, *Research Handbook on Soft Law*, Cheltenham, Edward Elgar, 2023.

[480] For an analysis of the legal effects specifically of this Notice see BIONDI, A., STEFAN, O., *The Notice on the Notion of State Aid: Every Light Has Its Shadow.*

cannot depart from these rules “under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations”[481]. Thus, compliance with these guidelines shall be expected.

However, besides decisions which verbatim quote the Notice – often without clarifying some practical application issues which will be addressed later[482] – , rather predictably the latter was not recalled in certain decisions dealing with support to cultural industries, in which the non-existence of the aid was based not on the divide between economic and non-economic activities (and that in the light of the dual nature of cultural industries) but on the lack of affectation of trade[483], even though reference to the guidelines would have however fit well in cases in which greater attention was paid to the non-commercial nature of the financed activity[484].

What appears rather surprising is on the contrary the missed reference to the Notice (and the departing from it) in cases in which support to cultural institutions such as museums is examined.

This emerges from example from a 2017 decision on the prolongation of a Dutch support scheme to cultural institutions[485]. Here the Commission did not depart from the approach followed in the previous pre-2016 assessment[486], simply affirming that “some cultural institutions, such as museums, theatres, operas etc., although established on a non-profit basis, normally offer their services on a market […] and compete with other EU undertakings that are also active in the same market.

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481 Joined cases C-189, 202, 205, 208 & 213/03, *Dansk Rørindustri and others v. Commission,* ECLI:EU:C:2005:408, para. 211. This line of reasoning was also reaffirmed in the State aid field in C-526/14, *Kotnik*, ECLI:EU:C:2016:570, para. 40, and in C-431/14 P, *Greece v. Commission*, ECLI:EU:C:2016:145, para. 69-70.

482 See e.g. SA.42545 (2015/N) – Germany, *Revitalisation of the Hamburg Congress Centre (CCH)*. Here the Notice was expressly taken into account, but the Commission for example did not clarify the meaning of “fraction” of the true costs (indeed, this case it was simply stated that: “the ticket prices in the category for events a) described in paragraph (5) of the present decision cover only ca. 10-20 % of the rental price of the event organisers (costs of the event's organisers). Therefore, the visitors of the mainly local and cultural events pay only a fraction of the real costs of the event´s organisers. The Commission concludes that as regards these activities, the CCH is not meant to be commercially exploited, and that the part of financing which can be linked to this part can in principle be excluded from the application of the State aid rules”. Thus, a “safe-harbour”, in the sense of a threshold under which the financed activity will be not be considered as non-economic, is not established.

483 See for example the already mentioned SA.45512 (2016/N) – Spain, SA.47448 (2017/N) – Spain.

484 See for example SA.60697 (2020/N) – Slovakia, *State aid scheme to support the culture of national minorities Slovakia.* Here it was underlined that the recipients of the grant were generally not-profit making entities, and that a part of them was providing the publications free of charge or for a symbolic (therefore non-commercial price). For these reasons, the financed projects, aiming at safeguarding a cultural minority, were considered, by their very nature, as not commercially interesting, but on the other hand as possessing particular importance in terms of their contribution and the promotion of national and cultural diversity.

485 SA.49411 (2017/N) – Netherlands, *Multiplied gift deduction – prolongation*.

486 SA.34357 (2012/N) – Netherlands, *Multiplier Giftenaftrek*.

Therefore, they must be considered to be involved in an economic activity"[487]. Even though the non-economic character of the activities performed by other cultural institutions, such as libraries or charitable foundations – which are found not to normally carry out an economic activity consisting in offering goods or services on the market –, is acknowledged, there is no attempt to concretely draw a line between economic and non-economic nature, by establishing some criteria helpful in this respect, and the specificities of certain cultural institutions are not examined; this approach is first of all not consistent with the 2016 Notice, but it appears to be neither in line with the CJEU case-law calling for a substantial interpretation of the notion of undertaking[488].

6.1 The 2023 Polish case: two steps forward, one step backward?

The same tendency to stretch the concept of economic activity in spite of the guidelines adopted in 2016 can be detected in a rather significant case – dealing with an aid granted to the Museum of Polish History for the design and the construction of its permanent headquarters in Warsaw – which might be considered illustrative of the criticalities still existing when the distinctive features of cultural institutions have to be integrated in State aid discipline, also shedding light on the issues arising from the concrete assessment of distortions of intra-EU trade.
Moving from this case, more general considerations on these aspects will follow, in the attempt to highlight how market-related concerns tend in the end to overshadow the specificities of cultural activities through a rather cautious approach followed by the Commission, a tendency which – apart from more theoretical considerations on the tensions between culture and competition – might also thwart the 2016 attempt to guarantee legal certainty.

6.1.1 The tout-court economic character

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[487] *Ibid.*, para 41.

[488] See e.g. case C-74/16, *Congregación de Escuelas Pías Provincia Betania v. Ayuntamiento de Getafe*, ECLI:EU:C:2017:496, a preliminary ruling which also addressed the issue of the nature of educational courses by religious bodies. Here it was first of all recalled that "In order to determine whether the activities in question are those of an 'undertaking' within the meaning of EU competition law, it is necessary to ascertain what the nature of those activities is: each of the different activities of a given entity must thus be examined to determine whether it falls to be classified as an 'economic activity'" (para. 44), and then, on this basis, it was significantly underlined that the economic nature could not be considered as characterising "courses provided by certain establishments which are integrated into a system of public education and financed, entirely or mainly, by public funds. Indeed, in establishing and maintaining such a system of public education, which is, as a general rule, financed from public funds and not by pupils or their parents, the State is not seeking to engage in gainful activity, but is fulfilling its social, cultural and educational obligations towards its population" (at para. 50).

When presenting the distinctive features of the supported museum, the Polish authorities resorted to a number of arguments that, should the 2016 Notice be applied, could have led to excluding its economic character. Indeed, attention was paid by Polish authorities to the uniqueness of the museum's object and to its limited revenues but the Commission, without verifying the existence of some kind of not substitutability character of the offer and without neither examining the ratio between public support and museum's other revenues, simply affirmed that exposing objects of cultural value in exchange for entrance fees should be in principle considered to be an economic activity, and hence should not be exempted from the State aid rules as such, also in the light of the fact that, as also recalled by the Polish authorities, some of the ancillary activities of the museum could potentially constitute economic activities[489], in this way also ignoring the aforementioned *Analytical Grid* for public funding to cultural infrastructures.

Apart from this lack of consistency with the 2016 Notice, however, it should be also underlined that, even in the case the Commission decided to apply the latter, two criticalities would have nevertheless probably emerged.

First of all, with regard to the concept of non-substitutability, the reference made by the Commission in the Notice to public archives keeping unique documents in order to provide an example of it might in the end offer a deceiving perspective on the distinction between the notions of substitutability and non-substitutability. Indeed, the latter appears to be linked merely on the existence of cultural products which are objectively one-of-a-kind, without taking into account a more refined concept of non-substitutability, which does not seem to be related exclusively on the uniqueness of the financed cultural activity[490] but also and foremost to consumers' preferences.

[489] See para. 39 and footnote n. 8.

[490] The use of the word "activity" instead of "product" here aims at underlining that, for example in cases regarding public funding to museums, the concept of non-substitutability should be also extended to the safeguard and promotion activities carried out by the latter, to the extent that they are directly related to the non-substitutable objects they keep. For this reason, the reconstruction made by the Commission in SA. 38391 (2014/N) – Estonia, does not seem to be completely acceptable, in so far as it affirms – with regard to State compensation of damage incurred by an owner of an international exhibition, that: "In that respect one important element is whether some kind of competition exists, i.e. if there are other entities offering the same or substitutable goods and services. If a market, however limited, exists for the activity concerned then the activity is organised on market principles and it is to be considered economic. In the context of the case at hand, other operators than the beneficiaries of the measure, like for example, municipal museums, exhibition agencies or private initiatives may offer similar and substitutable services of organizing international exhibitions, confirming the existence of a market. The beneficiaries of the measure qualify therefore as undertakings for the purposes of EU State aid rules". Indeed, the substitutability of a mere organization activity should not lead to considering as substitutable the "final" cultural product, in this case an exhibition.

The latter, indeed, play a pivotal role in defining the so-called "relevant product market"[491] which, together with the "relevant geographic market"[492], define the relevant market within which a given competition issue should be assessed. This attempt to shift from a subjective concept of non-substitutability to an objective one – even though for sure mainstreaming the appraisal of the economic or non-economic nature of the financed activity – ends up raising some doubts, especially in the light of the specificities of cultural products, in which such an assessment appears to be rather complex[493].

In the cultural field, the lack of a perfect substitutability and the subsequent crucial role played by each consumer, which appears to be rather clear when museums displaying different objects are at stake, emerges also in cases in which some kind of substitutability might appear to be more likely, as the case of the alternative digital streaming platforms/live theatre shows[494], and interestingly regards also the way of experiencing museums in the digital age. Indeed, as it has been pointed out with regard to the digital reproduction of artworks – when therefore the greater difference is not in the cultural product itself but on the way of experiencing it – virtual visits are often considered not as substituting actual participation to an exhibition but as something merely complementing it[495].

Once clarified the limits of the objective substitutability as emerging from the 2016 Notice, the focus will move briefly to the concept of coverage of a "fraction" of the true costs, not recalled in the Polish case, which simply attaches the economic character of the activity to the fact that the exposition of objects of cultural value is offered in exchange for entrance fees.

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491 See the Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C 160, 5.5.2023, 1, at para. 12, lett. (a) where it is stated that "The relevant product market comprises all those products that customers regard as interchangeable or substitutable to the product(s) of the undertaking(s) involved, based on the products' characteristics, their process and their intended use […]".

492 *Ibid.*, lett. (b), according to which: "The relevant geographic market comprises the geographic area in which the undertakings involved supply or demand relevant products, in which the conditions of competition are sufficiently homogeneous for the effects of the conduct or concentration under investigation to be able to be assesses, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas".

493 The need to carry out an exam specifically aiming at appraising the substitutability of a cultural product was for example underlined by SINNAEVE, A., *Does Aid for Theatres affect Trade between Member States?* in *European State Aid Law Quarterly*, 2008, vol. 7, issue 1, 7-11, at 11.

494 On the substitutability between live theatres and digital offer – a topic which gained greater importance in the aftermath of the Covid-19 pandemic – see, among others, AEA CONSULTING, *From live to digital – Understanding the Impact of Digital Developments in Theatre on Audience, Production and Distribution*, 2016, HADIDA, A.L., *Hollywood studio filmmaking in the age of Netflix: a tale of two institutional logics*, in *Journal of Cultural Economics*, vol. 45, 213-238.

495 This is the conclusion reached in EVRARD, Y., KREBS, A., *The authenticity of the museum experience in the digital age: the case of the Louvre*, in *Journal of Cultural Economics*, 2018, vol. 42, 353-363.

The main issue here emerges quite clearly: indeed, the meaning of fraction is not clarified, as well as the predominance criterion used to identify economic activities[496]: these two concepts – even though representing a step forward in comparison to decisions in which the simple presence of significant revenues besides public funding was considered as indicative of the economic character of the financed activity[497] – can be therefore interpreted in different ways, adding uncertainties to the already blurred divide between economic and non-economic activities.

However, even should these criteria be clarified, linking the character of the activity to the way of financing is not entirely convincing, and that for various reasons.

First of all, both public and private funding to cultural or heritage conservations activities – as well as the ratio between these two different sources – might be subject to fluctuations, also depending on external factors, as the Covid-19 pandemic recently shown[498]: thus, attaching the economic or non-economic character to a transitional factor might lead to ever-changing assessments of the activity's nature, which on the contrary is supposed to be more stable.

For this reason, focusing on cultural activities' mission might be a better solution, attaching the non-economic nature to the fact that through them cultural and social aims are pursued, not commercial ones[499]. This was also the approach followed by the CJEU, which – while appraising whether educational activities should be considered as services normally provided for remuneration[500] – significantly stated that the State, in organising education systems, does not carry out a gainful activity,

[496] Reference here is to the aforementioned para. 35, according to which cultural or heritage conservation activities *predominantly* financed by visitor or user fees or by other commercial means should be qualified as economic in nature.

[497] See case NN 50/2007 – Austria, *State guarantee in favour of Austrian National Museums*, where the economic qualification was based on the fact that "in addition to the public subsidies the federal museums generate significant revenues from admission fees and other commercial activities such as sponsoring, the museums' shop and the museums' café or restaurant" (at para. 20).

[498] See for example PROKUPEK, M., *et al.*, *Museum financing strategies during the pandemic: pulling out all the stops*, 16th International Conference on Arts and Cultural Management, 2022, where it is underlined the impact of the pandemic on the combination of funding sources, with greater reliance on external income sources.

However, apart from crises such as Covid-19, as pointed out by LINDQVIST, K., *Museum finances: challenges beyond economic crises*, in *Museum Management and Curatorship*, 2012, vol.27, no.1, 1-15, at 15, even though museums financial management's characteristics may tend to be related to fluctuations in the economic cycle, severe challenges in the long-term – potentially affecting financial stability – , such as changing political priorities and lower levels of public funding, have to be taken into account.

[499] This is also the perspective adopted by BALDI, C.E., *Finanziamento della cultura e regole di concorrenza. Nuove prospettive dal ripensamento della Commissione europea*, in *Aedon*, 2016, no. 6.

[500] See cases 263/85, *Belgian State v. René Humbel and Marie-Thérèse Edel* [1988], EU:C:1988:451, C-109/92, *Stephan Max Wirth v. Landeshauptstadt Hannover* [1993], ECLI:EU:C:1993:916

aiming on the contrary to fulfil "its duties towards its own population in the social, *cultural* and educational fields" (emphasis added).
In other words, it might be useful to adopt an approach similar to the one which in the past led to consider – as already pointed out – the exercise of State prerogatives outside the scope of competition law, this time exempting what have been defined as "public policy goal activities"[501], in the attempt to fully acknowledge the fact that such activities are tightly related to State intervention[502].
Of course, a balancing exercise would be needed in order to avoid an unduly broad exemption from State aid discipline, but for example other criteria – such as the public or private nature of the financed entity – could be introduced alongside the source of funding one, which on the contrary, if used alone, might prove to be unable to wholly take into account the peculiar intrinsic nature which cultural activities may present and the specific role of State intervention which – as already underlined – is also enshrined at the constitutional level in certain Member States.
By focusing not only to the way of funding but also on other factors, such as the public or private nature of the entity financed[503], it would be then possible also to

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[501] This is expression used by VAN DE GRONDEN, W., *The Enforcement of the State Aid Rules by National (Judicial) Authorities*, in LOOIJESTIJN, A., *et al.* (eds), *Boosting the Enforcement of EU Competition Law at the Domestic Level*, Cambridge, Cambridge University Press, 2017, at 146. According to it, in order to assess whether activities aiming at achieving public interest goals should be considered exempt from State aid discipline, a three-steps test must be carried out. More specifically, it must be verified that the public interest goal is outlined as such by the State, for example in a piece of legislation, then it must be assessed whether the activities under scrutiny are closely related to such goal and, lastly, whether the activities are virtually entirely financed by the State. However, van der Gronden is also aware of the practical issues arising from this test and, among other criticalities, also the interpretive doubts surrounding the level of financing by the State are highlighted (the public funding has to cover all the costs? Is private funding admitted?). Given the need for the Commission and the EU Courts to clarify these aspects, according to the Author the point of departure of such elaboration will be the specificity of public policy goals activities, which cannot be considered as the offering of goods and services on the market. Indeed, "[t]he activities concerned are not part of the marketplace, as their *raison d'etre* is State intervention" (at 147).

[502] This point was also raised during the 2014 Consultation by the Danish Ministry of Transport (see *Comments to "Draft Commission Notice on the notion State aid pursuant to Article 107(1) TFEU"* and *Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest*, 28.2.2014), in which it was stated that: "Member States should be able to undertake general public interest activities (exercise public powers) without being subject to unnecessary State aid control". Interestingly, the Ministry, in order to shed light of the State's mission and to broaden the notion of "exercise of public powers", suggested to replace the latter with the term "exercise of public interest activities".

[503] The relevance of the difference between private and public entities emerges for example in the Italian legal framework, if Art. 111 of the Code of Cultural Heritage and Landscape (Legislative Decree No. 42 of January 22, 2004) is examined. Here it is affirmed that the revenues from admission fees to the institutes and places belonging to or handed over to the State shall be used for the implementation of measures for the safety and preservation and operation of the institutes and places of culture belonging to or handed over to the State, as well as for the expropriation and purchase of cultural property, including through the exercise of pre-emption. In other words, these revenues are just an instrument the State can resort to in order to cover the expenses which would otherwise cover through public funding.

avoid distortions, such as the one which might lead to deny the non-economic nature of entities which try to cover their costs by relying on tools which are strictly commercial[504]. Indeed, to cope with the shrinking of public resources, cultural institutions often resort to private funding, which can take the shape of donations but also of sponsoring or of spaces' renting for private events: in these cases, attaching the economic nature to such elements would appear debatable, also in the light of the fact that this kind of approach could lead to consider as economic the activities carried out by cultural institutions by the mere fact that the latter were capable of successfully finding private financial resources, which on the contrary is something worth incentivizing in order to better support the activities of the institution itself[505].

6.1.2 The distortion of intra-EU trade: a leap in logic?

However, as anticipated, labeling certain activities as non-economic is not the only means through which a given support measure can be exempted from scrutiny. Indeed, by insisting on the so-called "pure local character" of the financed activity, the Commission often excluded the inclusion of the latter within the scope of Art.107(1) on the basis of the lack of distortion of intra-EU trade.

This approach rather clearly emerges in decisions on measures aiming at supporting activities attracting a limited audience, for geographical or linguistic reasons[506] – and on this basis deemed not to affect the internal market –, even though the method followed by the Commission to determine an activity's capability of attracting foreign tourists have been at times controversial; this is shown for example by the fact that a high threshold is often set to rule out an effect of trade, without carrying out refined analysis of the relevant market[507], showing a tendency to apply Art.107(1) anytime an affectation of intra-EU trade is merely potential but

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[504] It appears worth recalling that reference to commercial means is made by the Commission in the 2016 Notice, at para.35, where it is stated that "cultural or heritage conservation activities (including nature conservation) predominantly financed by visitor or user fees *or by other commercial means (for example, commercial exhibitions, cinemas, commercial music performances and festivals and arts schools predominantly financed from tuition fees)* should be qualified as economic in nature" (emphasis added).
[505] Of course, here the reference is not to all the activities carried out by the institutions by only to the ones having a cultural purpose.
[506] With regard to cultural activities see for example decisions N530/99 – Spain, *Subvention pour la restauration du monastere de Santa Maria de Retuerta,* and NN 136/A/2002 – France, *Ecomusée d'Alsace*, where the Commission stated that, in principle, museums activities are not object of trade between Member State in the light of the fact that, with the exception of a few museums of internationally recognized importance and reputation, the inhabitants of member states do not cross borders with the main aim of visiting a museum. In the same vein, see, among others, N 630/2003 – Italy, *Local Museums Sardinia*, SA. 36581 – Greece, *Construction of Archaeological Museum*, SA. 34466 – Cyprus, *Centre for Visual Arts and Research*.
[507] See SINNAEVE, A., *Does Aid for Theatres affect Trade between Member States?* cit.

it cannot be excluded[508]. Also, even though exempting activities having a local impact appears to be coherent with the general attempt to streamline State aid control which started with the State aid modernisation, drawing a line between local and non-local activities might prove to be rather complex, giving once more rise to relevant interpretive issues[509].

However, it appears also worth pointing out that the Commission, besides the aforementioned tendency to at times presume the existence of distortions of intra-EU trade, at the same time also showed some kind of reluctance to consider support to activities characterised by a local character as impacting on it[510] – as also mirrored by a draft soft law act which, however, was never adopted[511] – , following an

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[508] As it will be pointed out later, this cautious approach is in line with the CJEU's perspective on the matter. With specific regard to the economic analysis of the relevant market, see case C-494/06 P, *Commission v. Italy and Wam Spa* [2009] ECLI:EU:C:2009:272. Here, at para. 58, was stated that "it would suffice that the Commission show correctly how the aid at issue was likely to affect trade between Member States and to distort or threaten to distort competition. The Court of First Instance notably stressed in that context that the Commission was not obliged to carry out an economic analysis of the actual situation of the relevant market or the patterns of the trade in question between Member States or to show the real effect of the aid at issue, in particular on the prices applied by Wam, or to examine Wam's sales on the United Kingdom market".
However, it should be also pointed out that, even though it is not necessary neither to circumscribe the market nor to investigate the actual impact of the measure, as also recalled by the 2016 Notice, the effect of trade cannot be hypothetical or presumed (as also affirmed by the General Court in joined cases T-447/93, T-448/93 and T-449/93, AITEC and others v. Commission [1995], EU:T:1995:130 at para. 141.

[509] In general terms see PETZOLD, H.A., *The Difficulty of Being 'Local'*, in *European State Aid Law Quarterly*, 2018, vo.17, no.2, 250-258. The difficulties encountered in determining the local nature of an activity are also highlighted in ZELGER, B., *The 'Effect on Trade' Criterion in European Union State Aid Law*, in *European State Aid Law Quarterly*, 2018, vol.17, issue 1, 28-42.
The lack of clarity also affects the provision of SGEIs, as it was also recalled in a report developed by the European Committee of the Regions (*Regions and cities providing SGEIs: identifying difficulties resulting from the State aid framework*, 2020): here, referring to the 2012 Communication on the application of State aid rules to SGEI, it was more specifically underlined that, even though the Commission in many cases made reference to the local character in order to declare measures as not affecting trade between Member States, it is not possible to define a threshold below which intra-EU trade is not affected. This, according to the report, creates a "crucial ambivalence": indeed, "[e]xcluding State aid because of the local nature of an intervention, while simultaneously not defining a threshold or an unequivocal indication for this, creates a grey zone".

[510] See for example SA.37432 – Czech Republic, *Funding to public hospitals in the Hradec Králové Region*, where the Court considered the support scheme to public hospitals as not liable to affect trade between Member States because they could not "reasonably be foreseen to have more than a marginal effect, if any, on the conditions of cross-border investments and establishment between Member States". This approach appears to be less strict than the one referred to before. Indeed, as noted by DEKKER, C., *The 'Effect on Trade between the Member States' Criterion*, in *European State Aid Law Quarterly*, vol. 16, issue 2, 154-163, the reference to nothing more than a marginal effects implies that, however, an effect cannot be excluded: following this line of reason entails that measures characterised by a marginal impact on intra-EU trade will not be considered as constituting aid, while the CJEU – as it will be highlighted later – does not set threshold below which trade will not be affected.

[511] See European Commission, *Draft Communication from the Commission: A new framework for the assessment of State aid which has limited effects on intra-Community trade*, which was accompanied by another draft Communication concerning the assessment of lesser amounts of State aid.

approach which does not seem to be wholly consistent with the CJEU's case-law[512]: indeed, the latter does not establish a threshold below which intra-EU trade is not affected, on the contrary adopting a more cautious approach in order to safeguard its integrity[513] which is also confirmed by the fact that – despite the wording of Art. 107(1)[514] – an actual effect on internal trade is not required, enough being the appraisal of whether the aid is liable to affect it[515].

As previously pointed out, the Commission's perspective on activities of local nature and effects on trade – which appears to be at times rather ambivalent, oscillating between reluctance to apply Art.107(1) in cases with a marginal impact on intra-EU trade and willingness to safeguard the integrity of the latter by sticking to the cautious approach of the CJEU – is now enshrined in the 2016 Notice, which also explicitly addresses activities in the cultural sector. More specifically, according to the Notice, given the general assumption that public support to cultural events and entities performing economic activities which are unlikely to attract users away from similar offers in other Member States is not able to affect intra-EU trade, "only funding granted to large and renowned cultural institutions and events in a Member

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[512] This was also underlined, among others, by ARHOLD, C., *News from the Member States*, in *European State Aid Law Review,* 2012, vol.11, issue 3, at 543, and by DEKKER, C., *The 'Effect on Trade between the Member States' Criterion*, cit.

[513] See for example the landmark *Altmark* case (C-280/00, *Altmark Trans v. Regierungspräsidium Magdeburg* [2003], ECLI:EU:C:2003:415), where it was stated that: "Finally, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected. The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned".

[514] Indeed, while for example Art.101(1) TFEU applies to practices "which *may* affect trade between Member State" (emphasis added), in the case of Art. 107(1) State aid discipline covers any measure which "affects trade between Member States", therefore suggesting that this criterion can be met less easily. As it will be briefly shown later, by referring to the CJEU's case-law, this is not the case, being on the contrary enough a potential breach of intra-EU trade.

[515] See case C-518/13, *The Queen, Eventech Ltd v. The Parking Adjudicator* [2015], ECLI:EU:C:2015:9. Indeed, here it was affirmed that: "for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States [...] but only to examine that aid is liable to affect such trade. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid."17 The Court considered that "the view must be taken, in particular, that it is conceivable that the effect of the bus lanes policy is to render less attractive the provision of minicab services in London, with the result that the opportunities for undertakings established in other Member States to penetrate that market are thereby reduced, which is for the referring court to determine*"*. In commenting this passage of the ruling, it is significantly underlined by SEGURA CATALÁN, M.J., CLAYTON, M., *Effect on trade of a state intervention: the fifth criterion in the notion of state aid*, ERA Forum, 2020, at 5, that this conclusion sheds light on a pivotal element of the notion of State aid, namely the fact that it is "based on its effects" (at least in the Commission's perspective, it might be important to add).

State which are widely promoted outside their home region has the potential to affect trade between Member States".

In spite of this underlying approach, which appears to be favorably inclined towards cultural activities, the decision on the Museum of Polish History shows the possible negative repercussions of the lack of clarity surrounding the concept of local nature and, more in general, of a test to be carried out to assess the effects on intra-EU trade of a given measure.

Indeed, in the 2023 decision, the Commission pointed out that the line of reasoning according to which support to small local museums should be generally considered not to affect trade between Member States cannot be followed when the financially supported museum is located in larger cities[516]. This choice appears to be to some extent loosen up the criteria set by the 2016 Notice, which refers only to large cultural institutions[517], not large cities, to consider Art.107(1) as applicable.

In other words, tourism, namely one of the main positive externalities of cultural activities[518], often used to stress the relevance of promoting cultural activities in the Union, might be regarded here as an instrument used by the Commission to broaden the extent of State aid discipline. However, in the light of the uniqueness of the Museum's offer – which is also objective, being the focus on Polish national history, and which make the service likely to be provided only in Poland and therefore hardly in competition with museums in other Member States –, the existence of intra-EU trade appears to be debatable, even though this choice can be considered as coherent with the Commission's perspective on the idea of substitutability emerging in the same decision (or rather, with the choice not to take into account this factor in assessing whether an economic activity was carried out).

In spite of this "internal" consistency in the 2023 Polish decision, the contrast between the Commission's conclusions in this case and the 2016 Notice appears to

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[516] More specifically, according to the Commission "there is no evidence of strong competition between the Museum of Polish History and similar museums in the European Union. Such competition would *prima facie* appear unlikely since that would be the first museum depicting the history, culture and heritage of Poland as a whole, and not focusing on regional history or a specific period in time. It should be noted that support to small local museums is generally considered to not distort competition and affect trade between Member States. However, this is not necessarily the case for museums situated in larger cities. In this regard, the Commission observes that the number of expected visitors of the museum per year (approximately 667 000, of which 150 000 would be foreign visitors) is not negligible. Based on the information available, the Museum of Polish History might attract tourists to an extent that could distort competition and would be liable to affect on trade on the internal market. Therefore, based on the information available, the funding of the Museum of Polish History is liable to distort competition and affect cross-border trade" (paras. 40-42).

[517] More specifically, as already recalled, reference in para.197 lett. (b) is to large and renowned cultural institutions and events which are widely promoted outside their home region.

[518] Of course, reference here is not to tourism in itself but to the positive effects stemming from it. For example, in Council of Europe, European Commission, *Economic impact of the Cultural Routes of the Council of Europe in the European Union macro-regions*, 2020, the focus is on the positive impact on regional development, transnational cultural co-operation, and social cohesion.

be rather clear: it remains to be seen whether this detachment from the latter – showing a setback for what concerns the accommodation of cultural concerns in state aid law, especially with regard to the concepts of substitutability and remuneration – will occur again. What can be affirmed in the meanwhile is that – in so far as cultural activities are concerned – the 2016 Notice is not fully satisfactory, being additional clarifications needed in order to better understand which activities are to be considered as falling outside Art.107(1) and which ones on the contrary could only be considered compatible with the internal market through Art.107(3)(d).

7. State aid rules and sport

After this thorough analysis of public support to the cultural sector – and of its compatibility with state aid rules –, it appears worth briefly examining another realm characterised by a similar migling of economic and non-economic aspects, namely the sport one, also in order to see how a provision up to a certain extent similar to Art. 167 TFEU, namely Art. 165 TFEU, is capable of shaping Commission's decisional practice in assessing the compatibility with the internal market of support measures to the sport sector, showing once more how state aid discipline appears to be capable of adapting to non-economic interests also when an *ad hoc* provision such as Art.107(3)(d) is missing.

The competence of the EU with regard to the latter is enshrined in a provision up to a certain extent similar to Art. 167 TFEU, namely Art. 165 TFEU, according to which "The Union shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function", therefore vesting the Union once more with a supporting competence.

Art. 165 – however – does not shield the sport sector from the application of free movement and competition rules: in particular, the broad scope of the latter[519] was for the first time affirmed in the aforementioned *Meca Medina* case[520] – where the Court affirmed the need to subject to review all sporting organisations' regulations exerting economic effects and to assess their legality under competition law on a case by case basis[521] – and it has been more recently affirmed in three rulings

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[519] With regard to free movement rules see the aforementioned *Bosman* case (case C-415/93, *Jean Marc Bosman v. Union Royale Belge Sociétés de Football Association* [1995], ECLI:EU:C:1995:463.

[520] Case T-313/02, *David Meca-Medina and Igor Majcen v. Commission of the European Communities* [2004] ECLI:EU:T:2004:283.

[521] This conclusion builds upon one of the first rulings regarding European sports law, namely the one delivered in *Walrave* (Case C-36/74, *B.N.O. Walrave, L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclism* [1974], ECLI:EU:C:1974:140), where the Court affirmed that sport is subject to EU law "in so far as it constitutes an economic activity". Also, as underlined in the *Piau* judgment (case T-193/02, *Piau v. Commission* [2005], ECLI:EU:T:2005:22), related to the possibility to apply competition rules to FIFA's rules on players' agents), the fact that a sport association or a federation are classified as

delivered in December 2023 and explicitly regarding the possibility to apply Artt. 101 and 102 TFEU to sporting activities[522].

What emerges from this recent set of decisions is first of all the antitrust provisions' broad scope – and that in keeping with the previous CJEU's case law – but also some kind of "specificity of sport", the latter defined – in a Study drafted on behalf of the Commission – as "the inherent characteristics of sport which set it apart from other economic and social activities"[523], a specificity which now acquires its own dignity also through Art. 165 TFEU. Indeed, the latter, its incapability of creating a "sport exception" notwithstanding, appears to be rather relevant in leading the Court to affirm the need on the one hand not to exclude the application of EU law in the sport sector, on the other hand to take into great attention the specific features characterising the latter when carrying out the substantive analysis of the cases[524]: this approach surfaces rather clearly in the *European Super League Company* case, where the Court affirms that the qualification of a rule as a restriction by object or by effect requires "a specific assessment of the content of that rule in the actual context in which it is to be implemented"[525], and then that the peculiarities of the sport realm have to be relied upon – at the justification stage – when evaluating whether a rule pursues legitimate objectives[526].

Art. 165 plays a pivotal role also in the specific sector of state aid: indeed, in the latter no "sport derogation" comparable to the cultural one can be detected, making the presence of both economic and non-economic aspects even more challenging and leading to an increasing importance of this provision, which have been widely employed – by both the CJEU and the Commission – in order to "concretise" the distinguishing features of sport by enshrining the latter in a specific provision: this clearly emerges in the *Olympique Lyonnais* case[527], in which the Court, after having affirmed that the qualification of a transfer system as a restriction on free movement shall take into account the specific characteristics and functions of sport, also

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'amateur' cannot be considered as an automatic proof of the fact that these entities do not engage in economic activities.

522 Case C-333/21, *European Superleague Company SL v. FIFA, UEF*A [2023] ECLI:EU:C:2023:1011, case C-680/21, *UL, SA Royal Antwerp Football Club v. URBSFA, UEFA* [2023], ECLI:EU:C:2023:1010 and case C-124/21 P *International Skating Union v. Commission* [2023], ECLI:EU:C:2023:1012.

For a detailed analysis of these cases see S. BASTIANON, *Antitrust e sport: tra concorrenza e competizione sportive, in I confine dell'antitrust. Diseguaglianze sociali, diritti individuali, concorrenza*, Bologna, Giappichelli, 2023.

523 See ECORYS, KEA, SPORT AND CITIZENSHIP, *Mapping and Analysis of the Specificity of Sport. A Final Report to the DG Education & Culture of the European Commission*, 2016, 3.

524 This is underlined by A. VILLANUEVA, *Accounting for the specificities of sport in EU law: Old and new directions in the 21 December 2023 judgements*, in *The International Sports Law Journal*, 2023, vol. 23, 442-430.

525 *European Superleague Company*, para. 105

526 *Ibid.*, para. 106.

527 Case C-325/08, *Olympique Lyonnais v. Olivier Bernard*, ECLI:EU:C:2010:153.

underlined that the importance of these factors was corroborated by Art. 165 TFEU and, more specifically, by its reference to the sport's specific nature and social and educational function.

As it has been underlined, state aid discipline appears to be then constitutionally connected to the relevance acknowledged to the peculiar nature of sport by Art. 165[528], that increasingly gained relevance in an area of competition law the interplay with sport's specificities of which was initially underestimated[529].

For starters, this provision has been over the years widely employed by the Commission in its compatibility assessment of measures aimed at supporting the construction of sport infrastructures, namely one of the most relevant categories of aid in the sport field.

The attention towards these measures significantly increased after the aforementioned *Leipzig-Halle* case[530], which represents a turning point for public funding of infrastructures: indeed, before this landmark ruling, the latter were considered as free of state aid, while with the advent of *Leipzig-Halle* the construction of infrastructures linked to economic activities was understood as falling within the scope of Art. 107(1) TFEU[531], with the possibility of excluding only the financing of infrastructures not commercially exploited and built in the interest of the general public. However, as the majority of sport infrastructures are commercially exploited, EU countries soon started notifying the Commission their support measures towards these projects, in this way triggering the development of the Commission's practice.

Already from a brief overview of the cases addressed after Leipzig-Halle, a rather consistent and favorable attitude emerges. Interestingly, as it has been pointed out[532], the Commission translated the general principles employed before 2011 to exclude the existence of State aid in the meaning of Art. 107(1) into operational criteria aiming at exempting support measures under Art. 107(3): this is for example shown

[528] In these terms GARCÍA, B., *et al.*, *A new horizon in European sports law: the application of the EU state aid rules meets the specific nature of sport*, in *European Competition Journal*, 2017, vol. 13, issue 1, 28-61, 38.
[529] For example, no attention was devoted to state aid and sport in EUROPEAN COMMISSION, *White Paper on Sport*, COM(2007) 391, while some little reference to the topic was made in the document accompanying the White Paper (EUROPEAN COMMISSION, *The EU and Sport: Background and Context – Accompanying Document to the White Paper on Sport*, SEC(2007) 935) at para. 3.2.2, where – however – the lack of a significant amount of decisions relating to support measures to the sport sector was pointed out.
[530] Joined cases T-443/08 and T-455/08, *Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v. Commission* [2011].
[531] Indeed, using the words of NICOLAIDES, P., *A critical analysis of the application of state aid rules to sport*, in *Maastricht Journal of European and Comparative Law*, 2015, vol. 22, issue 2, 209-223: "The *Leipzig-Halle* case gave birth to the principle of inseparability of infrastructure from a subsequent economic activity that is carried out in that infrastructure. If indeed they are functionally and commercially inseparable, then the infrastructure is also classified as economic in nature".
[532] VAN ROMPUY, B., VAN MAREN, O., *EU control of State aid to professional sport: why now?*, in *Asser Institute, Research paper series*, 2016, issue 1.

by the fact that, while before *Leipzig-Halle* support measures towards sport infrastructures were considered as State responsibility in order to exclude the existence of an economic activity, in the following decisional practice the existence of the same State responsibility was employed to prove that the aid was aiming at achieving a specific objective of common interest[533].

In this context, in which many support measures were considered compatible with the internal market on the basis of Art. 107(3)(c)[534], with the Commission carrying out a balancing exercise between the positive effects of the aid and the negative ones, in terms of distortion of competition[535], Art. 165 – often together with the Amsterdam declaration on sport[536] – was exactly used to recall the State's responsibility in supporting the construction of sport infrastructure and framing the latter as a common interest objective[537]. At times, in the light of the multifunctional nature of the financed infrastructure – possibly hosting cultural events –, also the cultural mainstreaming clause of Art. 167(4) was explicitly taken into account in the Commission's assessment.

Also, besides this focus on the common interest objectives allowing the application of Art. 107(3)(c), the Commission also shed light on the issue of under-investment in sport infrastructures, consequently considering the support measures necessary and well-designed, and recalled the need for aid to be proportionate. More specifically, with regard to this last aspect, the Commission applied the principle that

533 See for example decision SA. 35135, *Multifunktionsarena der Stadt Erfurt* [2023], para. 14: "With regard to the achievement of a policy objective of common interest, the construction of venues for sport and other public events and supporting different types of activities which benefit the general public can be considered a State responsibility towards the general public".

534 As already recalled at the beginning of the Chapter, according to this provision it is possible to consider compatible with the internal market the "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest".

535 As underlined by NICOLAIDES, P., cit, who also recalls how the thresholds of the tolerable distortion of competition are not clear.

536 The reference here is to the 1998 Declaration in sport annexed to the Treaty of Amsterdam, according to which: "The Conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport" (Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts
- Declarations adopted by the Conference - Declaration on sport [1997] OJ C 340, 10.11.1997, 136.

537 See e.g. SA. 35501 (2013/N) - France, *Financement de la construction et de la rénovation des stades pour l'EURO 2016*, SA. 46530 – Slovakia, *National Football Stadium*, SA. 58891 (2023/N) - Czechia, *Aid for the construction of a multifunctional hall in Brno*, SA. 37373 – The Netherlands, *Contribution to the renovation of ice arena Thialf in Heerenveen*, SA.37342 (2013/NN) – United Kingdom, *Regional Stadia Development in Northern Ireland*, SA. 33728 – Denmark, *Multiarena Copenhagen*, SA. 37109 – Belgium, *Football stadiums in Flanders*.

subsidised infrastructure shall not be used by a single professional sport user in order to ensure the proportionality of the support measure[538].

In 2014, drawing on this considerable decisional practice (which, as underlined, was in turn the product of the approach developed in the pre-*Leipzig Halle* and rearranged to satisfy the new requirements for a measure to satisfy in order to be considered compatible), a sport-specific treatment of support measures for sport and multifunctional infrastructures was included in Art. 55 of the GBER Regulation[539], which especially affirms the need for the sport infrastructure not to be used exclusively by a single professional sport user and the more general need to ensure access to the infrastructure, on a transparent and non-discriminatory basis[540]. However, as already underlined with regard to aid to the cultural sector, even though this intervention significantly speed up the procedures, by enabling Member States not to notify their support measures to the Commission, the decisional practice developed by the latter over the years still represents the reference point for all the measures which cannot resort to Art. 55 GBER and which, consequently, still have to be evaluated by the Commission on a case-by-case basis, following what has been approved in the past.

The existence of this consistent and favorable approach towards measures aiming at financing sport infrastructures, developed over the years and then consolidated, with the GBER, into hard law, cannot be detected in the field of measures for professional sports club, where sector specific rules have not been articulated yet[541] and a more mixed perspective was adopted, ranging from the green light given to

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538 See for example case SA. 27373, where it was underlined that "the usage obligation with which the operating company will have to comply ensure that several types of users will be able to benefit from ice skating facilities. The renovation, with public support, of the ice arena will therefore benefit professional and amateur sports *as well as the general public*" (emphasis added). This passage appears to be rather interesting also because – in line with the aforementioned tendency to include into the scope of Art. 107(1) also amateur activities – the line, when distinguishing economic and non-economic activities, is not drawn between professional and amateur sports, rather between these two and the general public.

539 Art. 55, para. 2: "Sport infrastructure shall not be used exclusively by a single professional sport user. Use of the sport infrastructure by other professional or non-professional sport users shall annually account for at least 20 % of time capacity. If the infrastructure is used by several users simultaneously, corresponding fractions of time capacity usage shall be calculated". Doubts might arise here with regard to the fact that – potentially – the financed infrastructure can be in the end also be used only by (different) professional users, somehow not considering the need for the infrastructure to be used also by what has been defined as the "general public" (see the previous footnote, where a line was drawn between the latter and both amateur and professional sports).

540 *Ibid.*, para. 4.

541 This is also underlined in VAN ROMPUY, B., VAN MAREN, O., cit., 14. The Authors here also draw an interesting parallel between the consolidation of operational exemption criteria in the sport sector and the one which took place in the audiovisual sector with the 2001 Cinema Communication and the GBER.

the support measures adopted in favour of Dutch professional football clubs[542] to the aid denied to other Spanish clubs[543].

Under both the circumstances, Art. 165 appears play a less relevant role than in decisions on sport infrastructures. Indeed, even when the Commission concluded by declaring the measures compatible with the internal market, this assessment was not based on the specialty of sport[544], but on other contrary on an application of the discipline of rescue aid an in the analysis of restructuring plans.

A similar approach – even though the outcome was diametrically different – was followed in the Spanish saga, which led the Commission to consider the aid granted to Real Madrid, FC Barcelona, Athletic Club Bilbao and CA Osasuna[545], as well as a transfer of land to Real Madrid[546], as incompatible with the internal market. In both cases, Art. 165 and the special nature of sport were recalled by the Commission in the documentation gathered for the preliminary assessment, but besides that also the growing economic relevance of sport was pointed out[547]. In line with this, in its final decision with regard to the first case, the Commission – in spite of the relevance in abstract terms acknowledged to Art. 165, capable of being the basis for an objective of common interest *ex* Art.107(3)(c) – concluded that this provision could not be used to justify selective support to certain strong actors within a highly competitive economic sector. More specifically, in the Commission's perspective, while Art. 165 appears to be aiming to the general support of sport, the measure at stake were considered as supporting specific professional sport clubs[548]. The influence of Art. 165 appears even more limited in the second Spanish case, the one related to the land's transfer to Real Madrid, where Art. 165 was not even mentioned, once more questioning sport's specificity (or rather, the possibility of the latter to significantly steer the Commission decisional practice on state aid to professional sport clubs).

Somehow in contrast with what had been affirmed at the beginning with regard to the wavering of the Commission's approach towards support measures to sport clubs, it can be then said that, setting aside the plain differences in terms of outcome between the Dutch and the Spanish cases, a *fil rouge* seems to link them all, namely the difficulties faced by a provision aiming at promoting sport in general, therefore pursuing a general interest, in a sector in which support measures are by definition

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542 See *infra,* footnote issue 213.
543 See *infra*.
544 Art. 165 is not mentioned neither in *Willelm II* case (SA.40168 - The Netherlands - *State aid for the professional football club Willem II in Tilburg*) nor in *Den* Bosch (SA. 41614 – The Netherlands, *Aid to Dutch Football Club Den Bosch*), while in MVV (SA.41612 – The Netherlands. *Aid to Dutch Football Club MVV*) is recalled only to refuse the application of Art. 107(3)(d) to sport.
545 SA.29769 (2013/C) (ex 2013/NN) – Spain, *State aid to certain Spanish professional sport clubs*.
546 SA.33754 (2013/C) (ex 2013/NN) – Spain, *Real Madrid CF*.
547 This is recalled by B. GARCÍA, cit., 51.
548 This emerges rather clearly in SA.29769, paras. 87-89.

selective. However, moving back to the aid to sport infrastructures, to which extent do the financed infrastructures concretely serve the general interest and not only certain professional actors using them also remains to be seen, leading to cast doubts upon the ample use of Art. 165 when assessing support measures in order to satisfy the requirement of the common interest objective.

CHAPTER IV - SOME REMARKS ON CULTURAL CONSIDERATIONS IN MERGERS AND ANTICOMPETITIVE AGREEMENTS

In the previous Chapter, the relevance of the cultural mainstreaming clause went rather unnoticed, and that given the existence of an *ad hoc* derogation introducing the cultural sector's specificities in the State aid realm: thus, if on the one hand it was showed that a coexistence between culture and competition is possible – in spite of a rather marked economic paradigm which, as it has been pointed out, overshadows the distinguishing features of cultural activities – on the other hand the presence of an explicit cultural exception prevented to see whether there is also room for some kind of synergy between the two, a synergy made possible exactly by Art. 167(4) TFEU and expression of that "integrationist method" the relevance of which had been previously stressed.

However, such possibility is offered by the two other competition's law branches, namely mergers overview and antitrust rules, the latter prohibiting anti-competitive agreements, where it is not State action to be addressed but on the contrary the market behavior of private actors[549]. Indeed, now the attention will turn to them in order to see how cultural considerations – lacking an explicit provision disciplining their relationship with competition rules – are concretely integrated in these fields and, also, to assess the extent upon which the latter can be considered as self-standing and not directly related to economic ones.

More specifically, mergers will be first of all tackled to see whether, by introducing cultural concerns in Commission's evaluations, it is possible to safeguard cultural diversity while averting at the same time the risk of the creation of dominant market players.

On a different note, an insight into anticompetitive agreements will be useful to investigate a sector in which, over the years, the Commission – as anticipated – has been prone to balance economic and non-economic considerations, cultural ones included. It is worth clarifying that under the label 'cultural considerations' will now fall issues related not to the safeguard and enhancement of cultural heritage but rather to the need to ensure the diversity of the output produced by cultural

[549] The interplays between cultural considerations and another pillar of competition law, namely the prohibition of abuses of dominant position (Art. 102 TFEU) on the other hand will not be tackled in this work, and that mainly in the light of the scarcity of relevant and representative cases adding new perspectives on the topic, other than the ones which will be introduced when analysing mergers and anticompetitive agreements. At the same time, it also appears worth underlining that cultural lenses – to be used in defining the relevant market and the characteristics of the products and the services traded within it – might nonetheless prove to be useful in applying Art. 102, in order to better assess for example the abusiveness of a conduct.

industries: for this reason, when dealing with mergers in the media sector, concerns about the protection of pluralism will also emerge[550].

In addition to these more general aspects related to the possibility of accommodating non-economic considerations in competition policy – to be analysed in order to try to understand whether the line drawn already in the late '60s by the CJEU and pointing at the need to frame competition policy within the overall objectives of the EU[551] survived the more recent pro-economic approach – the advent of digitisation will be dealt with in the last part of the Chapter, by introducing the issue of geo-blocking, in order to address the interplays between (access to) culture, competition and copyright policies in the Digital Single Market. By adding another element to the relationship between competition and cultural considerations, namely copyright law, the possibility to employ in the future the cultural mainstreaming clause, in combination with the rules on anticompetitive agreements, with the purpose of safeguarding European citizens' cultural rights will be touched upon, showing an additional and untapped synergy.

1. Merger control

The Treaties do not contain specific provisions devoted to merger control. However, given the not neglectable advantages coming from running the latter at the EU level and not at the Member State one – and that in the light of the need to ensure the well-functioning of the internal market[552] - in 1989 the Council enacted the first Regulation on the control of concentrations between undertakings[553], granting the Commission far-reaching powers to assess their lawfulness, later replaced in 2004 by a new Merger Regulation (ECMR)[554].

The ECMR, aiming at prohibiting concentrations which would significantly impede effective competition in the common market or in a substantial part of it[555],

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550 A clarification here is needed: even though the two concepts of cultural diversity and media pluralism do not coincide, in the following paragraphs they will be often tackled together, also in the light of the fact that, as already underlined with regard to the European Media Freedom Act in Chapter II, Art. 167 has been also used to recall the EU's obligation to take media pluralism concerns into account.

551 See for example case 14/68, *Walt Wilhelm v. Bundeskartellamt* [1969], ECLI:EU:C:1969:4, and case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973], ECLI:EU:C:1973:22.

552 The link between a European merger control and safeguard of the internal market was also underlined by the German Monopolies Commission (*Bundeskartellamt*) in the special report *Konzeption einer europäischen Fusionskontrolle*, 1989, at 18.

553 Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, OJ L 395, 21.12.1989, at 1.

554 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, at 1.

555 Art. 2, par. 3, ECMR. This new formulation is the product of the shift from the so-called "dominance test" characterising the 1989 Regulation to the so-called "substantive test". Indeed,

includes in its scope any concentration potentially capable of harming competition in the internal market, also in the cases of mergers presenting positive aspects. However, the latter are not devoid of any relevance, since they have to be taken into account in assessing their compatibility with the internal market and that on a case-by-case basis, lacking a legislation analogous to block exemption regulations. Indeed, besides the aforementioned prohibition enshrined in Article 2(3), the 2004 Regulation – through the third paragraph of the same provision and leveraging on the substantive nature of the test to be carried out in order to assess whether a concentration should be subject to the Commission's control[556] – also acknowledge the possibility of concentrations compatible with the internal market. More specifically, Article 2(2) provides that concentrations not significantly impeding competition shall be declared compatible with the common market. In making the appraisal, according to Art.2(1)(b), the Commission – always given the need to take into account "the need to maintain and develop effective competition within the common market"[557] – shall consider a wide range of factors: among them, also the technical and economic progress brought by the concentration, provided that this progress is to consumers' advantage and does not constitute an obstacle to competition. As it has been underlined[558], this provision represents the counterpart in merger discipline of the ground for exception which can be found, for anticompetitive agreements, in Art.101(3) TFEU, which over the years – as it will be seen later on – has been widely used to integrate non-competitive considerations in EU antitrust law.

1.1 A formalistic approach to cultural diversity?

However, apart from the possibility of balancing anti-competitive effects and consumers' interest which is already implied by the combination of Articles 2(2) Art.2(1)(b), the very same attempt to embed merger control within the overall

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Art.2 in its previous version prohibited a merger "which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it", therefore requiring a proof of dominance to exercise control over the concentration. On the substantive test introduced by the 2004 Regulation see, among others, TZOUGANATOS, D., *EC Merger Regulation 139/04: The Substantive Issues*, in *Rabels Zeitschrift für ausländisches und internationals Privatrecht*, 2005, vol. 69, issue 4, 746 ff., MONTI, G., *The New Substantive Test in the EC Merger Regulation – Bridging the Gap Between Economic and Law?*, in *Cambridge Yearbook of European Legal Studies*, 2008, vol. 10, 263 ff.
For an analysis of the factors concretely leading to significant impediments to effective competition see IBÁÑEZ COLOMO, P., *EU Merger Control Between Law and Discretion: When Is an Impediment to Effective Competition Significant?*, in *World Competition*, 2021, vol. 44, issue 4, 347-372.

[556] See the previous note. Also TZOUGANATOS, D., cit., at 755, affirms that the new formulation of Articles 2(2) and (3) "can be viewed as a means to accentuate the autonomy of the 'significance' criterion".

[557] Art.2(1)(a).

[558] FRENZ, W., *Handbook of EU Competition Law*, Berlin, Springer, 2016, at 1212.

Treaty's framework can be also found in Recital 23 of the ECMR, according to which the Commission, when evaluating merger's compatibility with the common market, shall "place its appraisal within the general framework of the achievement of the fundamental objectives" of the Treaties, once more confirming the need to integrate competition into them, therefore also including

With specific regard to Art. 167(4), if merger cases in the audiovisual, publishing and also music sectors are analysed, on a first glance the Commission might appear at times willing to include cultural considerations in its assessments; indeed, besides pursuing the main goal of safeguarding market access, the EC at times openly tackles cultural diversity issues, sometimes also making explicit reference to Art.167(4), and this can lead the interpreter to the conclusion that, by exercising merger control, the Commission might have been also openly willing to ensure cultural diversity at the same time.

In order to understand whether the Commission had a genuine cultural agenda, it is important to go beyond the mere references to cultural diversity in merger decisions in order to see whether a proper cultural impact assessment was carried out in concrete. Indeed, not rarely the EC seems to be simply relying on the assumption that the more the actors on the market are, the more varied is the offer of contents provided: apart from the perplexities on this equation, mainly related to the fact that content variety often do not take into account qualitative considerations[559], doubts might raise as to whether the Commission, when referring to cultural diversity, is safeguarding the latter in itself or it is including it within its assessment just because of its repercussions on consumers' welfare[560], somehow in coherence with the approach which has been characterising EU competition law lately.

This tendency to automatically link cultural diversity to consumer welfare can be for example detected in the *Comcast/NBC Universal* case[561], dealing with the creation of a joint venture between Comcast – a company mainly involved in operating cable systems in the U.S., among its other activities also licensing in the EU TV programming and TV channels for distribution by pay-TV operators – and NBCU – namely a global media and entertainment company operating in the development, production, marketing and distribution of entertainment, news and information, based in the U.S. but also present in the EU through activities such as licensing of

[559] This issue will be analysed later.
[560]The focus on consumer welfare can be also detected in the Commission Staff working Document accompanying the *Report on Competition Policy 2023*, SWD(2024)53 final. More specifically, when introducing the contribution of EU competition policy to the development of the media sector, it was highlighted that: "The Commission's activity in the media sector aims at ensuring that consumers can benefit both from a wide choice and unrestricted access to high quality content at competitive prices, as well as from increased technological innovation"(at 59), while no reference is made to cultural considerations.
[561] Case No COMP/M.5779, *Comcast/NBC Universal*, 13.07.2010.

rights for motion pictures and TV programmes and international general entertainment pay-TV channels. After having examined the markets' structure, the Commission – in addressing cultural diversity concerns – denied a harm to the latter, underlining that the notified operation would not significantly impact on the availability of TV content for licensing, hence being unlikely to harm consumer choice, placing in direct relation consumer choice and cultural diversity[562].

The same approach is also followed in other decisions considering cultural diversity as a natural consequence of the undistorted functioning of the market and for this reason also rejecting the need for a specific cultural impact assessment[563], somehow considered as absorbed by the more general impact assessment on consumers' welfare[564].

Yet, it appears also worth mentioning that in other cases potentially giving rise to cultural diversity issues the latter – rather surprisingly – are not even addressed by the Commission; this emerges for example from a decision in the publishing sector which led to the creation of a giant in the field. The reference here is to the clearance

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[562] "Since the parties have a small presence on the different markets which have been analysed, the notified operation will not have any significand impact as regards the availability of TV content for licensing and is therefore unlikely to harm consumer choice and cultural diversity in the EEA" (at para. 44). The various criticalities of this approach are underlined by BANIA, K., *The Role of Media Pluralism in the Enforcement of EU Competition Law* [PhD Thesis], 2015, European University Institute, at 161. More specifically, according to the Author, the reasoning of the Commission is not fully convincing for example because of the impossibility of considering an increase in the number of TV channels as a proof of the competitiveness of the market or as an inducement to produce original content.

[563] In an emblematic way, in case No COMP/M.6866 – *Time Warner/CME*, 14.06.2013, the Commission stresses the need to safeguard cultural diversity when assessing the compatibility of mergers with the common market ("In assessing the impact of the notified concentration on competition in the above-mentioned sectors, the Commission also pays attention to aspects of cultural diversity, given that a reduction of choice may rise concerns with respect to cultural diversity in these sectors", at para.11), but then, in the following assessment, the merger's repercussions on cultural diversity disappear and are no longer tackled.

[564] See case M.8989 – *Sony/EMI Music Publishing*, 26.10.2018, where the Commission, in addressing the request to carry out a cultural diversity impact assessment, affirmed that: "Given that the present Transaction does not raise concerns as to the level of consumer choice, the Commission also considers that the Transaction does not raise concerns as to cultural diversity" (at para.181). Another clear overlap between consumers' interests and cultural concerns emerges in case COMP/M.6459 *Sony/Mubadala/EMI Music Publishing*, 12.04.2012, where the Commission found a merger to have a detrimental effect on consumers, by reducing their choice "in terms of having access to a wide range of innovative, comprehensive and cheap online music services". For this reason, "if end consumer choice for innovative, comprehensive and cheap online music services were to be reduced, this in turn would limit the number and breadth of music distribution channels that are available to competing music publishers. This ultimately reduces consumer choice for music and cultural diversity. According to Article 167 (4) of the TFEU, the Union shall take cultural diversity aspects into account in its actions under the other provisions of the Treaties, including the EU competition rules" [at para.240].

More in general, the same kind of approach followed in *Comcast/NBC* can be detected, for example, in case No COMP/M.5533 – *Bertelsmann /KKR/JV*, 08.09.2009; case No COMP/M.5838 – *Bertelsmann/Planeta/Circulo*, 05.07.2010; case No. COMP M.6369 – *HBO/Ziggo/HBO Nederland*, 21.12.2011; case No COMP/M.6792 – *The Walt Disney Company/Lucasfilm*, 20.12.2012.

to the creation of Penguin Random House[565], combining publishing businesses of Bertelsmann – namely an international media company operating in television, television production, music rights management, trade publishing and magazine publishing – and Pearson – active in publishing educational materials, business information and trade publishing. In the Commission's decision, in spite of the magnitude of the merger – involving many different segments of the publishing sector – no cultural diversity impact assessment can be found, being the latter once more probably "absorbed" by the verification of the competitiveness of the market. More specifically, attention was paid by the Commission to the fact that small and medium enterprises were not threatened by the emergence of the Penguin Random House, therefore guaranteeing a variety of actors on the market[566].

1.2 The need for qualitative considerations

Even though the overlap between competition issues on the one hand and, for example, issues related to media pluralism on the other, seems to be at times undeniable[567], some kind of qualitative considerations should be probably introduced in the overall mergers' compatibility assessment (not necessarily incorporating an obligation to do so in the Merger Regulation, and that also in the light of the presence of the cultural mainstreaming clause[568]).

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565 Case No COMP/M.6789 – *Bertelsmann/Person/Penguin Random House*, 05.04.2013.

566 See for example para. 119-120 of the decision: "The Commission also investigated whether it would be likely that only large publishers - that is to say, excluding small and medium-sized publishers - would coordinate their behaviour on the market for the acquisition of authors' rights. A large majority of publishers, including smaller publishers, explained that it was unlikely, given the competitive nature of the publishing industry, the number of competing publishers, and the continual changes within the industry, that large publishers would be able to coordinate their behaviour on the market for the acquisition of author's rights […]".

567 See for example the 2020 report by the European Audiovisual Observatory *Media Pluralism and competition issues*, where – even though by reference not only to mergers but to antitrust in general – the positive repercussions of unimpeded economic competition on media landscape's diversity (see at 119). The same report, however, appears to be also aware of the limits of competition instruments: for example, it is affirmed that the latter can also hinder cultural diversity if the global players' influence in the market under investigation is not taken into account, and that because "Suppliers that are subject to national or EU regulations are increasingly competing with international suppliers that are not, which suggests that existing antitrust and competition law should be interpreted and applied in such a way as to strengthen European media companies' global competitiveness". (see at 6)

568 The introduction of a proper obligation to carry out an assessment of the effects not on cultural diversity but on media pluralism was suggested for instance by CRAUFURD-SMITH, R., *Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship*, in *European Law Review*, 2004, vol.29, issue 5, 652-673, at 669, KOMOREK, E., *Media Pluralism and European Union*, 2013, Alphen aan den Rijin, Kluwer Law International, at 281-283. Against this interpretation BANIA, K., *cit.*, who noted that – the presence of Art.167(4) notwithstanding – considering undistorted competition as dependent on the protection of pluralism would not be appropriate, and that because of the already stressed intrinsic weakness of the cultural mainstreaming clause.

More specifically, when dealing with the need to ensure varied cultural contents on the market, it should be borne in mind that a huge quantity will not always necessarily match a concrete variety; indeed, content diversity is a more complex concept, which also encompasses for example the cultural offer's capability of addressing minorities' taste, therefore implying a qualitative component besides the quantitative one[569].

In its decisions, the Commission appears to have often marginalised this distinction, by relying on merely quantitative elements in evaluating concentrations[570], without considering factors such as originality, quality and creativity[571]: a notable exception to this trend is represented by the 2004 *Lagardère*

At the national level, media pluralism tests have been also introduced in merger control. For example, in the U.K. the Communications Act 2003 modified the Enterprise Act 2002 to establish such test: more specifically, Ofcom (the Office of Communication) and CMA (the Competition and Market Authority), when dealing with mergers concerning newspapers and broadcasters, will have to report on public interest issues (including pluralism ones) and competition. In assessing the evaluated merger's repercussions on pluralism, Ofcom will take into account both quantitative factors and qualitative ones

569 Somehow reflecting the difference between content and media conveying the content, and indirectly implying that the variety of the latter does not necessarily correspond to the variety of the former, GIBBONS, T., *Concentrations of Ownership and Control in a Converging Media Industry*, in MARSDEN, C.T., VERHULTS, S.G. (eds.), *Convergence in European Digital TV Regulation*, London, Blackstone, 1999, 155-173, at 157, identifies three different levels of pluralism in the media sector, namely content, source and outlet. Among them, content appears to be the most substantive in ensuring pluralism – being therefore the ultimate goal of regulation –, while source and outlet have to be considered as merely instrumental to it, unable to ensure by themselves the pursue of the ultimate goal.

Always with regard with the specific issue of media pluralism, the relevance of the distinction between quantitative and qualitative aspects was also underlined by VALCKE, P., *Looking For the User in Media Pluralism Regulation: Unraveling the Traditional Diversity Chain and Recent Trends of User Empowerment in European Media Regulation*, in *Journal of Information Policy*, vol.1, 287-320. In the Author perspective: "quantitative refers to a merely numerical assessment of diversity, while qualitative diversity of media sources, products, and consumption is assessed on the basis of qualities like language, gender, ethnicity, religion, program type, etc. So while quantitative diversity can be expressed in numbers of media owners, newspapers, or TV channels, qualitative diversity relates to questions such as: does a company's board or entire workforce reflect the gender, national, linguistic, or other diversity (in the region or in society as a whole); how diverse are newspapers or TV channels in terms of program formats, functions, targeted audiences or viewpoints, etc." (at 291).

570 See for example the decision *Nordic Satellite Distribution*, Case IV/M.490 [1995] OJ L 053/20, where it was only noted that the operation would result in "less variety in the offer to Nordic TV households", or *NewsCorp/Telepiù*, case COMP/M.2876, 06.08.2010, where consumer welfare was explicitly take into account but no detailed assessment was carried out to clarify the impact of the operation on the latter ("should the merged entity decide to […] exert its monopsonist power to such an extent that some TV channel providers exit the market […], consumers would enjoy a greatly reduced variety of products and freedom of choice", at para. 173).

571 See the arguments brought forward by the Independent Music Publishers Association (IMPALA) when lodging an action for annulment of the decision took in case No COMP/M.3333 – *Sony/BMG*, 19.07.2004, with which the Commission considered compatible with the internal market the establishment – through the merger of Sony and BMG – of SonyBMG, a global recorded music joint venture. According to IMPALA, when giving the green light the Commission did not "consider whether the concentration might result in an ability to reduce supply, in terms of numbers

decision[572]. In dealing with the acquisition by Lagardère – a French company active in the media, communication and publishing sectors – of Vivendi Universal Publishing's publishing assets in Europe and Latin America, the Commission interestingly offered a broader concept of contents' supply; more specifically, it underlined how the latter "embraces more than just the number of titles offered for sale in a year", being characterised by a "qualitative dimension that is a great deal subtler than the number of books sold", meaning that for a substantially diversified supply products which are only physically different will not suffice, being on the contrary a contents' diversity needed[573].

So far, on the basis of an analysis of the relevant Commission's decisions in the sector, the approach followed in *Lagardère* appears to be a *unicum*, also in the light of the fact that, in the other cases, references to the cultural mainstreaming clause – as already underlined – represent an end in itself, not framed within a more complex cultural impact assessment[574], and also considering that quite often cultural diversity's concerns overlap with consumers' welfare ones.

It remains to be seen[575] whether cultural diversity will be expressly addressed by the Commission in the recent *Vivendi/Lagardère* case[576], concerning once more a relevant concentration in the publishing sector and involving two of the largest French multi-media groups. Indeed, in spite of the not easily deniable cultural diversity concerns potentially arising from the operation[577], neither in the 2023 *Report*

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of new titles or in terms of originality of new releases, or whether it would impoverish creativity, quality and diversity in musical choice […] or would have an impact on consumer choice". In more explicit terms, IMPALA also underlined that "the analysis took no account of Article 151(4) EC or of cultural diversity (see case T-464/04, *Impala v. Commission* [2006], EU:T:2006:216, para. 107). The General Court found the decision to be vitiated by manifest error of assessment and inadequate reasoning: even though the cultural argument was not addressed, the ruling was welcomed by IMPALA as "victory of music and cultural diversity". See the IMPALA Press Release, *European Court annuls Sony/BMG merger. Independents win landmark judgement*, 13.06.2006)

[572] Case No COMP/M.2978 *Lagardère/Natexis/VUP*, 07.01.2004.

[573] *Ibid.*, at para. 676.

[574] The reluctance of the Commission to carry out a more complex impact assessment of concentrations, introducing within it also qualitative considerations, is also confirmed by the lack of long-term effects of the aforementioned IMPALA ruling, the latter optimistically representing – in the perspective of the then-President of IMPALA – a "landmark judgement" capable of inaugurating a new era for cultural impact assessment in merger control (see again the press release at note 19. More specifically, according to the then-President: "This is a watershed in European affairs. A landmark judgement for music. There is no doubt that it will block any further mergers and will transform how music and other creative sectors are treated. We have proved that, by acting collectively, we can challenge the unchallengeable. We will make the terms of the UNESCO convention on cultural diversity a reality in the market place. The EC will now promote cultural diversity under Article 151 (4) of the EC treaty and carry out a proper cultural diversity impact assessment across its decision making").

[575] The decision has not been published yet.

[576] Case M.10433, *Vivendi/Lagardère*, 08.11.2023.

[577] These issues are also recalled in the *Competition Merger Brief* of December 2023. More specifically, in this document – also focusing on the specificities of the French book sector, characterised by regulatory attempts to preserve cultural diversity and to protect small and medium booksellers –

on Competition Policy[578] nor in the staff document accompanying it[579] references to cultural issues can be found, being the focus merely on the merger's consequences in terms of functioning of the market.

1.3 Possible synergies between mergers and safeguard of cultural diversity

However, the relationship between mergers and cultural diversity does not necessarily have to be interpreted in terms of contrast, meaning that at times concentrations might also prove to be useful in safeguarding the latter. This possibility emerged already in the aforementioned Penguin Random House operation, which – the lack of explicit reference to cultural diversity notwithstanding – was also linked to the willingness to create a powerful counterpart to Amazon and its aggressive pricing policy[580]; in this way, through the merger, the safeguard of a more diversified publishing scenario was also indirectly achieved.

A similar phenomenon – namely a concentration counter-intuitively and indirectly favouring cultural diversity – can be also detected in a recent French case, brought to the attention of the French Antitrust Authority. In 2019, the competition watchdog gave the green light – even though with major conditions attached – to the creation of *Salto*, namely a video on demand joint venture between the main French terrestrial broadcasters, aiming at creating a tool through which they could compete with international players in the audiovisual sector, such as Netflix[581]. Even though no reference to cultural diversity was made in the decision, the latter can be read in conjunction with another document issued in the same year, in which the Authority stressed how digitisation radically changed the competition between traditional and new actors active on the market[582], underlining the need to take into

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light was shed on the effects on the combined presence of Vivendi and Lagardère on the different markets of the book value-chain, from the acquisition of authors' publishing rights to the marketing and distribution phase. For example, the relationship between the presence on the marketing and distribution markets and the one on the market for the acquisition of rights was highlighted, affirming that, among other things, the merged entity could use its benefits from both marketing and distribution activities to increase the advance value paid to best-selling authors. As a consequence, competitors would be deprived of best-selling authors, their financial equilibrium would be jeopardized, with clear consequences in terms of harm on the whole book chain-value and, therefore, on cultural diversity.

[578] EUROPEAN COMMISSION, *Report on Competition Policy 2023*, COM(2024)115 final, at 20.

[579] Commission Staff working Document accompanying the *Report on Competition Policy 2023*, SWD(2024)53 final, at 60.

[580] See KAUFMAN, L. *Justice Department Approves Random House-Penguin Merger*, in The New York Times, 14.02.2013.

[581] AUTORITE DE LA CONCURRENCE, *Décision n. 19-DCC-157 du 12 août 2019 relative à la création d'une entreprise commune par les sociétés France Télévisions, TF1 et Métropole Télévision.*

[582] AUTORITÉ DE LA CONCURRENCE, *Avis n. 19-A.04 du 21 février 2019 relatif à une demande d'avis de la commission des Affaires culturelles et de l'Éducation de l'Assemblée nationale dans le secteur de l'audiovisuel.* Making reference to the new video-on-demand model, the Authority underlined that it undermined the traditional broadcasting one ("Ces nouveaux modes d'accès ont permis l'entrée de nouveaux

due account this element when considering a new regulatory framework for the audiovisual sector in the digital age[583]: in making this point, it explicitly affirmed the need not to make French audiovisual regulation protectionist only on paper, then going against the defence of cultural exception when concretely addressing the dynamics between traditional and new actors active in the field.

1.4 *Merger control and cultural diversity: mitigating the economic paradigm*

Two provisional conclusions can be then drawn on the basis of this brief analysis of the dynamics between cultural diversity and merger control.

First of all, competition law instruments and cultural aims can be complementary, always given, however, the need for remedies, such as the introduction of qualitative considerations in the assessment of the mergers' compatibility with the internal market, as clearly showed by the aforementioned *Lagardère* case. Indeed, if such aspects are not duly taken into account, there is a risk to overlook the need for a concretely varied cultural offer, in this way also neglecting the difference between quantity and variety. In other words, taking into account qualitative considerations might be considered as a way to mitigate the economic paradigm guiding competition law, potentially bending it to the achievement of purely cultural diversity related goals.

Secondly, acts that *prima facie* appear to be anticompetitive might nonetheless contribute to the maintenance of cultural diversity – and that, in the case of mergers, by giving national actors the means to compete with international ones – , therefore challenging the principle according to which the presence of a multitude of actors on the market would automatically guarantee a protection of cultural diversity.

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opérateurs, nationaux mais surtout internationaux. Il s'agit principalement des services de vidéo à la demande sur abonnements (VàDA), comme Netflix ou Amazon, ou des plateformes gratuites, dont You Tube […]. Ces nouveaux services ont rencontré un succès rapide auprès des consommateurs. […] Les offres VàDA présentent plusieurs caractéristiques communes : des catalogues riches de milliers de contenus très variés, avec un accent particulier mis sur les séries, souvent anglo-saxonnes et à gros budget, mais aussi d'origine locale et proposées aux abonnés du monde entier ; séries qui sont, pour une part croissante, produites en direct, sans passer par l'intermédiation des studios. Bien que les offres des VàDA soient spécifiques, elles fragilisent le modèle des acteurs traditionnels […] Les fondements de la concurrence entre les anciens et les nouveaux acteurs s'en trouvent bouleversés", at 2).

583 *Ibid.*, in particular at 84: "Si les opérateurs traditionnels tentent, depuis peu, de repenser leur modèle en développant de nouvelles offres de diffusion plus en phase avec les nouveaux usages de consommation, la régulation nationale fait peser sur eux seuls des contraintes en investissements, diffusion, et source de revenus que ne connaissent pas les opérateurs numériques. Compte tenu du nouveau paysage concurrentiel qui se dessine à vitesse accélérée, ces règles ne placent pas l'ensemble des opérateurs sur un pied d'égalité et doivent donc être rapidement repensées par un réexamen ambitieux et large. À défaut, ce sont, à échéance rapide, les investissements dans la création française qui seront être mis en danger, faisant de la régulation audiovisuelle française une protection de papier, *contraire à l'objectif souhaité de défense de l'exception culturelle*" (emphasis added).

2. Anticompetitive agreements

The same kind of reconstruction seems to fit also the dynamics between cultural considerations and anticompetitive agreements.

The discipline of the latter can be found in the TFEU, more specifically at Art. 101, which – as in the case of mergers – aims at guaranteeing undistorted competition by taming private behaviours, more specifically through the prohibition of cartels. However, once more, besides the general prohibition enshrined in paragraph 1 – according to which shall be banned as incompatible with the internal market "all agreements between undertaking, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market" –, it is also possible to find an exception to this rule. More in detail, according to Art.101(3), the general prohibition might not be applied in case of agreements (or category of agreements) between undertakings, decisions (or category of decisions) by associations of undertakings, concerted practices (or category of concerted practices), which contribute "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit"[584].

As already underlined in the second Chapter, the possibility of integrating non-economic considerations within Art. 101(3) has been widely studied over the years[585], also in order to evaluate the repercussions of the more economic approach. Indeed, one of the pillars the latter is built upon is exactly the need to take into account only economic efficiency when enforcing competition law[586], therefore *prima facie* hindering the inclusion of different interests.

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[584] Provided that, however, no restrictions which are not indispensable to the attainment of these objectives are imposed on the undertakings concerned and that such undertakings are not granted the possibility of eliminating competition in respect of a substantial part of the products in question.
[585] See MONTI, G., *Article 81 EC and public policy,* in *Common Market Law Review,* 2002, vol. 37, 1057 ff, NICOLAIDES, P., *The balancing myth: the economics of Article 81 (1) & (3)*, in *Legal Issues of Economic Integration*, 2005, vol. 32, issue 2, 123-145, ODUDU, O., *The Boundaries of EC Competition Law: The Scope of Article 81*, 2006, Oxford, Oxford University Press, SCHWEITZER, H., *Competition law and public policy: reconsidering an uneasy relationship. The example of Article 81*, 2007, *Working Paper No. 30. European University Institute (EUI), Department of Law*, SEMMELMANN, C., *The future role of non-competition goals in the interpretation of Article 81 EC*, in *Global Antitrust Review*, 2008, vol. 1, issue 1, 15-47, TOWNLEY, C., *Article 81 and public policy*, Oxford, Hart, 2009, VAN ROMPUY, B., *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU*, 2012, Alphen aan den Rijn, Kluwer Law International, BROOK, O., *Non-Competition Interests in EU Antitrust Law. An Empirical Study of Article 101 TFEU*, Cambridge, Cambridge University Press, 2022.
[586] In general, on the more economic approach, see, among others, WITT, A.C., *The More Economic Approach to EU Competition Law*, London, Hart, 2016.

2.1 Article 101 TFEU and cultural considerations

While some benefits are clearly defined by Art.101(3), as in the case of the cost-efficiencies in the production and distribution chains, there is no clear reference to the possibility not to incur in the general anticompetitive agreements' prohibition when non-competition interests[587] – such as the cultural ones – are pursued. This interpretive doubt notwithstanding, it has been stressed that a rule of reason – up to a certain extent recalling the U.S. one[588] and allowing the consideration of other policy goals when evaluating market operators' conduct[589] – could also lead to excluding the application of Art.101(1) when a public interest is pursued[590], and that also in coherence with a CJEU's case-law which can be considered as suggesting a broad interpretation of Art.101(3), not limited to economic benefits[591]. The relevance of policy-linking clauses, placing on the Commission an obligation to include non-economic interests in the assessments, was also stressed by the General Court: with specific regard to Art.167(4), it was specifically affirmed that the latter directly calls for the obligation "to bear in mind the requirements relating to the respect for and promotion of cultural diversity" when interpreting the conditions set by Art.101[592].

Always with regard to cultural considerations, already in 1993 – in the aftermath of the introduction of Art. 167 – also the Commission underlined how the safeguard of culture should be borne in mind when applying antitrust provisions. Indeed, in spite of the lack of reference to it in Articles 101 and 102, the need to introduce the cultural dimension when assessing cases in the light of the latter was stressed by the Commission itself, and that always considered that "the aim is not to frame a policy on culture or to make value judgments in applying the provisions, but rather to assess business practices with due regard to the repercussions they could have on

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[587] In spite of the possibility of linking the idea of benefit to a more concrete case by case analysis, here this concept is assimilated to the one of non-competition interest, even though, as underlined by BROOK, O., *cit.*, the pursue of a single non-competition interest might then generate multiple and different kinds of benefits.
[588] For an overview of the concept of rule of reason in American antitrust law see, among others, DECKERT, M.R., *Some preliminary remarks on the limitations of European Competition Law*, in *European Review of Private Law*, 2000, vol. 1, 173-185, at 179 ff., which provides some considerations on the possibility of shaping a European rule of reason,
[589] Specifically, on the need to give considerations to cultural policies through a rule of reason approach see FIKENTSCHER, W., *Wirtschaftliche Gerechtigkeit und kulturelle Gerechtigkeit*, in Heidelberger Forum, 1997, issue 98, 31 ff.
[590] For a more detailed analysis of public interest as limit of competition law see Chapter 2. For a focus on anticompetitive agreements, DUNNE, N., *Public Interest and EU Competition Law*, in *The Antitrust Bulletin*, 2020, vol. 65, issue 2, 256-281.
[591] For a reconstruction of EU courts' approach towards the types of benefits which could justify an exemption under Art.101(3), see BROOKS, O., *cit.*
[592] Case T-451/08, *Föreningen Svenska Tonsätteres Internationella Musikbyrå u.p.a. (Stim) v. European Commission* [2013], ECLI:EU:T:2013:189, para. 103.

the Community's cultural policy"[593], in this way trying not to unduly mix cultural and competition policies, by focusing on the contrary the concept of mainstreaming.

If the Commission's practice is examined, cases in which considerations related to the need not to negatively impact on cultural diversity are juxtaposed to the willingness to safeguard economic efficiency do emerge. Once more, what can be read in some decisions, as a watermark, is the distinction between a *wide* cultural offer – which the mere prohibition of anticompetitive agreements can contribute to – and a *diversified* one – on the contrary requiring a positive attitude, capable of paying attention to the already mentioned qualitative aspects.

The latter can be detected in the *EBU/Eurovision* case[594], specifically addressing international sports events' broadcasting but nevertheless worth mentioning in the present work because of the careful balancing exercise carried out by the Commission. More in detail, here the latter was asked to evaluate an institutionalised system of television programmes' exchange through a European network, aiming at enabling the members of the European Broadcasting Union (EBU) to jointly negotiate and acquire rights to broadcast international sports events. When assessing the possibility of granting an exemption on the basis of Art.101(3), the Commission paid great attention to the role played by the scheme in ensuring a wide and diversified offer in EU televisions, overcoming the limits of national generalist channels and – through what is defined as a "solidarity system"[595] – ensuring "a broad flow of sports programmes to all parts of the Eurovision", also adapting to the different needs of the different EBU members, in terms for example of selection of events[596]. Even though there is not explicit reference to cultural considerations, the Commission interestingly also addresses the contents of the broadcasted events, by affirming that – by participating to the consortium – EBU members have the possibility to offer a wider range of sports programmes, "including minority sports and sports programmes with educational, cultural or humanitarian content, that they cannot show on their national generalist channel"[597], in this way showing that also the access to a greater contents' diversity played some role in considering the benefits brought by the scheme as outweighing its anticompetitive effects[598].

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593 See European Commission, *XXIIIrd Report on Competition Policy 1993*, at point 175.
594 Commission Decision 93/403/EEC of 11 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.150 – EBU/Eurovision System), OJ L 179, 22.07.1993, 23.
595 *Ibid.,* para 32, where it is underlined the cooperation between financially more powerful organisations from large countries and smaller countries, in order to ensure "a broad flow of sports programmes to all partes of the Eurovision area".
596 *Ibid.*, para. 64.
597 *Ibid.*, para 62.
598 Also when addressing the fulfilment of the fair share's requirement, reference is made to the fact that "Consumers, i.e. the television viewers, benefit from the Eurovision System in that the System enables the members to show more, and higher-quality, sports programmes - both widely popular sports and minority sports - than they would be able to do without the advantages of Eurovision. The Eurovision System enables in particular national members from smaller countries to provide

Some kind of cultural concern can be also detected – though in a more nuanced way – also in the *UIP* case[599], dealing with a number of agreements concluded between three of the major Hollywood studios – more specifically Paramount, Universal and MGM – in order to establish a joint venture company (Universal International Pictures, UIP), the latter licensing worldwide – on an exclusive basis – the rights to films either produced or distributed by the aforementioned companies and their affiliates. Here the Commission, granting an exemption on the basis of Art.101(3), nevertheless imposed some undertakings to the companies involved with the – not explicit – aim of protecting the European film industry, suffering from the pressure exterted by the integrated main Hollywood studios[600]. However, as it has been already underlined[601], it cannot be said for certainty that the Commission was driven by pure cultural concerns, and that in the light of the decline that the European film industry was suffering at the time.

Following the Maastricht Treaty, cultural considerations have also been expressly taken into account by referring to the cultural mainstreaming clause, as shown for example by a 2011 case[602] dealing with the publishing house Penguin's participation in a concerted practice that might have existed between the latter and other actors active in the field, with the goal of carrying out a global strategy for the sale of e-books aiming at raising books' retail prices. Here, the reference to Art.167(4) appears to be reaffirming the need – already pointed out in the early 1990s – not to consider agreements' assessments as completely immune from cultural considerations, which are taken into account – either explicitly or implicitly[603] – mostly when imposing commitments on the undertakings involved in the anticompetitive practices,

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their chair viewers with a broad range of international sports events with a commentary in their own language and tailored to their specific national interests".

599 Commission Decision 89/467/EC of 12 July 1989 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.566 – UIP), OJ L 226, 3.8.1989, 25.

600 See for example para. 25, where it was stated that, in case of UIP's distribution refusal in the Community, the companies could make use of alternative distribution needs, in this way leaving some space to independent distribution networks, or para. 28, promoting at the same time local productions and independent distribution networks ("UIP and its partners agreed to amend the FA so that the partners retain the right individually to produce, finance or acquire distribution rights to non-English-language foreign local product and to offer such product to _ UIP for distribution. If UIP declines to distribute such product, each partner retains the right individually to do so through any alternative means").

601 PSYCHOGIOPOULOU, E., *The integration of cultural considerations in EU law and policies* cit., 152.

602 Case COMP/AT.39847 – *E-books*, 25.07.2013.

603 See for example the case AT.39673 – Virtual Print Fee agreements, where the Commission closed probe into Hollywood studios after the terms of contracts for digitization of European cinemas were changed. Indeed, the Commission was afraid that the original provisions could hinder access to digital cinemas for small film distributors, for this reasons the contracts were changed so that cinemagoers could watch both "Hollywood blockbusters" and "small budget and art house films" (see the press release "Antitrust: Commission closes probe into Hollywood studios after they change terms of contracts for digitization of European cinemas", 04.03.2011).

commitments which – as it has been underlined – seem to have replaced Article 101(3) exemptions[604].

However, this more culturally sensitive approach coexists with the tendency – already pointed out when dealing with mergers – to overlap cultural and consumer welfare considerations, for example by putting in direct contact the increased dissemination of cultural contents, obtained through an agreement between economic operators active in the audiovisual sector, and the benefits to consumers in terms of greater access to cultural content[605]: even though in antitrust cases the link between the two goals appears to be more immediate, and that in the light of the explicit reference to consumers in Art.101(3), the lack of a qualitative analysis – aiming to take into account the actual variety of contents offered by companies involved in the agreements – seems nevertheless worth noticing.

2.2 Fixed book price agreements

However, in spite of the need to avoid value judgements – also recalled by the Commission – when taking cultural considerations into account in enforcing antitrust provisions, the latter seem to be at times unavoidable: indeed, the balancing exercise might also prove to be rather sensitive, directly involving precise political choices[606]. This is clearly shown by the debate surrounding fixed book price mechanisms[607]: the latter, by letting a publisher – not rarely in accord with other

[604] This point is made by BROOK, O., *Priority Setting as a Double-Edged Sword: How Modernization Strengthened the Role of Public Law*, in *Journal of Competition Law and Economics*, 2020, vol. 16, issue 4, 435-487, at 473.

[605] See for example the *Simulcasting* decision (Case No. COMP/C2/38.014 – IFPI 'Simulcasting', OJ L 107, 30.04.2003, at 58), regarding an agreement between collecting societies aiming at facilitating the grant of multi-territorial licenses to TV broadcasters and radio, enabling them to simultaneously transmit on the internet recording already included in their programming. What is relevant to underline – apart from all the complex dynamics between competition and copyright which will be touched in the next paragraph when introducing geo-blocking practices, is that the Commission granted clearance to the agreement by stressing its effects in terms of greater contents' dissemination – for this reason fulfilling both the first and the second conditions set by Art.101(3), namely improvement of goods distribution and consumers' benefit – without making any reference to cultural diversity concerns.

[606] In particular, TOWNLEY, C., cit., appears rather skeptical towards the possibility for the Commission not to make value judgements when introducing the cultural element in assessments made on the basis of Art.101. Indeed, according to the Author: "Assessing business practices with due regard to the repercussions they could have on the Community's cultural policy means precisely weighing the benefit of these business practices against the cultural effects".

[607] The more general words "mechanism" or "schemes" will be used in the following subparagraphs in place of the word "agreement" as fixed book prices – as it will be clarified later on – can be introduced in the Member States either through private contractual agreements or through national regulation. In this second case there will not be violation of Art.101 TFEU, being this provision specifically targeting undertakings' behavior and being the extension to Member States not possible. Indeed, even though the so-called *effet utile* doctrine – based on Art.4, par. 3, TUE – has been used by the CJEU to extend the scope of Art.101 TFEU also to Member States, in order to ensure a

publishers – fixing a resale price for the books it publishes and by imposing this price to the final distributor, represent an instrument hindering the free competition's unfold, but at the same time – according to a certain reconstruction – might contribute to the promotion of cultural diversity, for example by favouring access to greater titles' diversity through cross-subsidisation and by protecting small booksellers which otherwise – with no limits to discounts – could not compete with bigger distributors.

2.2.1 The Commission's perspective: between the acknowledgement of cultural considerations' weight and trust in price competition

Fixed book price (FBP) schemes – namely resale price maintenance schemes applied to the publishing sector, put in place either though agreements between undertakings or statutorily provided – and their capability of contributing to a more diversified books' offering have always been looked with suspicion by the Commission. Exemplificative of the general stance of the latter can be for example considered the well-known *VBBB/VBVB* case, concerning an agreement between the Dutch and the Flemish Book Associations and prohibiting books published in Dutch from being sold both in the Netherlands and in the Flanders at a price lower than the one set by Dutch and Belgian publishers[608]. Despite the arguments brought forward by the parties, highlighting the resale price maintenance scheme's alleged capability of ensuring a wide range of titles on the market – therefore relying on the connection between RPM and cross-subsidisation[609] –, the Commission, even

uniform application of EU law, at the same time the Court also affirmed that, with specific regard to FBP, no resort to the *effet utile* was possible. More specifically, lacking an EU competition policy in the book sector, the obligations imposed on the Member States by Art.4, par.3 TUE and Art.101 TFUE were not sufficiently defined to prohibit them from adopting legislation providing for the fixing of book prices (see for example case C-254/87, *Syndicat des libraires de Normandie v. L'Aigle distribution* [1987], ECLI:EU:C:1988:413, case C-9/99, *Echirolles Distribution SA v. Association du Dauphiné and others* [2000], ECLI:EU:C:200:532). However, as it will be seen later on (see footnote n.83), the CJEU – even after having excluded the possibility to resort to antitrust provisions – still criticised the pieces of legislation enacted by Member State on the basis of the Treaty's provisions on free movement of goods.

[608] Commission Decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428 – VBBB/VBVB), OJ L 54, 25.02.1982, 36.

[609] *Ibid.*, para. 50: "The parties have claimed that the collective resale price maintenance scheme established by the agreement contributes to improving the production and distribution of the goods concerned, since the fixed price for Dutch- language books, even beyond national borders, allows subsidization of less popular books by fast-selling books and thus enables publishers to place a wide range of titles on the market. According to the parties, the fixed price represents a certain security for publishers when they decide to publish a book and such security is necessary if a wide range of titles is to be maintained. With a fixed price, the publisher is sure that the organized book trade will be prepared to stock and promote the sale of less-popular books. The fixed price also makes it possible for smaller publishers, who are often engaged in the publishing of commercially not very attractive books, to hold their own. On the distribution side, the fixed price means that the bookseller can stock a large and varied range of titles in his shop by subsidizing the costs on slow-

recognising the relevant role played by books as cultural medium, appears to be sceptical towards the effectiveness of the measure under analysis[610] and not ready to abide restrictions of competition to safeguard the publishing sector, affirming the need to protect the production of works of cultural value through means more in line with competition law.

Also, it appears worth noticing that – even though also in the post-Maastricht scenario the Commission will tend not to consider fixed prices as an effective means to protect and enhance cultural diversity – here more in general the need to integrate cultural considerations in competition policy seems to be denied, with the Commission underlining how "it is not for undertakings or associations of undertakings to conclude agreements on cultural questions, which are principally a matter for government"[611]. This approach might seem to be up to a certain extent contrasting with the one emerging in the aforementioned 1993 Report on Competition and with the need to consider cultural issues in enforcing antitrust rules: indeed, antitrust rules specifically target private undertakings' behaviour and not State ones, so diminishing the role played by cultural industries in disseminating culture[612] would in the end deprive the duty to take into account cultural considerations in enforcing competition rules of part of its meaning.

A similar skepticism towards the possibility of using fixed prices to safeguard cultural diversity can be also detected in another case dealing with the compatibility with the internal market of agreements concluded within the framework of the British Publishers Association and aiming at setting uniform conditions of sale of the so-called net books, namely books published at a price fixed by the publisher, providing that those products could not be sold to the public at a price lower than the one set by the publisher itself[613]. Also here, the Commission, the acknowledgment of the cultural value of books notwithstanding, is convinced of the possibility to resort to less restrictive (and less competition-distorting) means when attempting to improve both the publication and the distribution of books.

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moving titles from the profit on fast-moving ones. This profit enables him to offer ancillary services to the public and to place orders for individual customers".

[610] *Ibid.*, para. 53: "In any event the Commission considers that any objective advantages which might derive from the agreement are outweighed by its disadvantages from the viewpoint of competition. The Commission would maintain that the agreement to which this Decision relates has an adverse rather than a favourable effect on the distribution of books, because the system of collective resale price maintenance eliminates any price competition in the distribution of a given title. This is particularly damaging since, in the absence of significant competition between different titles, competition on the price of individual titles within the distributive trade is an important means of rationalizing and improving the distribution system".

[611] *Ibid.*, para. 60.

[612] Which the Commission however acknowledges, see *Ibid.*

[613] Commission Decision 89/44/EEC of 12 December 1988 relating to a proceeding under Article 85 of the EEC Treaty (IV/27.393 and IV/27.394, Publishers Association – Net Book Agreements), OJ L 22, 26.01.1989, 12.

What appears even more interesting to point out, always with regard to the *Net book agreements* case, is that the ECJ – in reviewing the decision after the introduction of Art.167 in 1992 and in annulling it[614] – did not address the cultural arguments brought forward by the applicant. Similarly, also in the opinion delivered by the Advocate General some kind of tautological reasoning can be detected. Without examining the concrete impact of the cultural mainstreaming clause on the fixed prices issues, the AG limits himself to affirming that a duty to take cultural aspects into account was already present in the ECJ's case law, that it was formalised through the introduction of Art.167(4) TFEU, and that the Commission did not overlook the cultural aspects in its decision[615]; no guidelines on the practical way of balancing competition and cultural interests were provided, neither here nor in the ruling.

Exactly in the light of the need to clarify the impact of the cultural mainstreaming clause, the Council soon started to exert pressure on the Commission, asking the latter to clarify whether Art.167(4) could be used in place of Art.101(3) to exempt fixed price schemes found to be incompatible with Art.101(1).[616] Soon after, a formal investigation into *Sammelrevers*, namely fixed price schemes in Germany, was started, potentially frustrating one of the main intents of the Council, namely providing a safe harbour for schemes widely spread around Member States and aiming at maintaining and enhancing the diversity and broad accessibility of books.

The fact that the investigation was opened while a study on the impact of Art.167(4) was still lacking was addressed in a written question to the Commission in 1999[617], and the answer given to the latter can be considered as exemplificative of the Commission's approach towards competition and RPM schemes in the publishing sector. Indeed, once more the EC explicitly acknowledged the duty to take cultural aspects into account when enforcing antitrust provisions, resorting to Art.101(3) – the latter representing a suitable instrument to carry out the balancing exercise –, but at the same time recalled that this openness to cultural interests cannot be considered as an automatic clearance for any agreement deemed to be justified on cultural grounds, being on the contrary necessary to demonstrate the alleged positive effects, and that also considering that "the readiness of the Commission to take account of cultural aspects in its decision making cannot result in a situation where it uses it policy discretion to take decisions which are contrary to other Treaty provisions". The German system of fixed prices was subject to a formal investigation exactly for this reason, because the Commission reached the provisional conclusion that the arguments brought forward by the parties – namely

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614 Case C-360/92 P, *Publishers Association v. Commission* [1995], ECLI:EU:C:1995:6.
615 See the Opinion delivered by Advocate General Lenz, 16.06.1994, at 52.
616 Council decision of 22 September 1997 on cross-border fixed book prices in European linguistic areas, OJ C 305, 7.10.1997, 2.
617 Written Question No. 773/98 by Jessica Larive to the Commission, Book price agreements and Article 128 of the Maastricht Treaty, OJ C 13, 18.1.1999.

the cultural benefits – could not justify an exemption: in this way the Commission, shaping an instrument capable of ensuring a diversified books' offer, once more presented a solution – namely price competition – diametrically opposed to the one presented by Member States – namely price maintenance[618]. The fact that in the end an amended version of *Semmelrevers* was declared compatible with the internal market cannot be considered as indicative of a Commission's change of paradigm: indeed, the negative clearance was only due to the fact that the new version of the agreements was regulating exclusively domestic sales, not affecting then trade between Member States, therefore falling outside of the scope of Art.101(1)'s prohibition[619].

Similarly to the Council, the European Parliament as well tried to protect national schemes fixing book prices: after having stressed the key role played in Member States by RPM schemes in the book sector, considered as a direct expression of Art.167(4)[620], it did not only call the Commission "to recognize and leave untouched[621]" the latter, considering the fixing of books prices as "better than any other system at improving the production and distribution of literary works without competition being eliminated"[622], but it also invited the EC to submit a legislative proposal on the fixing of book prices, also in order to reaffirm Member States' freedom to pursue cultural policy goals by adopting RPM schemes in the book sector. However, the Commission decided not to back the idea of this *ad hoc* legislative proposal, and that on the basis of the fact that harmonisation of domestic systems "would not bring sufficient benefits to justify changes to the legal framework developed by the Court of Justice", limiting its task to monitoring the implementation of national schemes in order to ensure their compliance with EU law[623].

2.3 Anticompetitive agreements and cultural diversity: exploiting or mitigating the economic paradigm?

[618] This perspective also emerges in the VBBB case, more specifically at para.62, where the relevance of service competition between booksellers – not endangered by RPM schemes – is downplayed: indeed, the Commission considers the latter as merely secondary to price competition.
[619] See the Press Release IP/00/651, 22.6.2000, "New German system of fixed book prices does not violate EU competition rules as long as certain conditions are respected".
[620] See the Resolution of the European Parliament of 20 November 1998 on common book price fixing across borders, OJ C 379, 7.12.1998, 391.
[621] Resolution of the European Parliament of 16 December 1999 on the fixing of book prices, OJ C 296, 18.10.2000, 210. From the Parliament's standpoint, the abolition of such mechanism would not only endanger books as cultural assets, but also violate Art.167(4).
[622] *Ibid.*
[623] Written Question E-2125/03 by Bart Staes to the Commission, Fixed book prices, OJ C 33 E, 6.2.2004, 223.

No major developments worth mentioning took place since the early 2000s: what can be then said, in an attempt to draw some conclusions, is that for the Commission the need to take cultural considerations into account when enforcing antitrust provisions has never been seriously disputed, but at the same time price competition still appears to be the best means to achieve cultural diversity goals: in other words, competition restrictions could be theoretically accepted in case of cultural benefits arising from them[624], but the Commission does not share – at least so far – the perspective of many Member States adopting FBP: indeed, in its opinion, the latter are not capable of pursuing cultural objectives, and that being competition itself capable of ensuring a wide range of cultural products on the market, with no need for corrective measures, sufficing to this purpose a general exemption such as Art.101(3), already capable of comprehending also cultural considerations merely through the reference to consumers' benefits[625]: the cultural mainstreaming clause would therefore only facilitate this broader interpretation of Art.101(3), allowing the introduction of a non-economic interest in this provision and not having further repercussions on the overall system.

From the Commission's point of view, there is no tension between antitrust rules and cultural diversity objectives, being the latter already pursued through the former: the friction appears to be more between the instruments chosen by Member States and by the Commission itself to pursue the same goal, showing that those value judgements which – as already pointed out in the aforementioned 1993 Report on Competition – should be avoided are at times unavoidable, requiring a choice between two diametrically different models. On the one hand the one according to which RPM schemes are capable of ensuring cultural diversity by allowing -

[624] See also Written Question P-2752/99 by Gerhard Hager to the Commission, Fixing of book prices, OJ C 225E, 8/8/2000, p. 200: "When the Commission applies the EC Treaty rules on competition, it therefore considers, in a positive spirit, whether an agreement or a practice has cultural objectives and contains cultural provisions which are actually put into practice and may justify imposing restrictions on competition commensurate with the objectives in mind. These questions are considered with a view to the possible application of Article 81(3) of the EC Treaty, which lays down that the Commission may exempt restrictive agreements or practices the advantages of which outweigh the disadvantages as regards consumers, provided that they simply impose the restrictions indispensable to the attainment of their objectives and do not eliminate competition in respect of a substantial part of the products in question. The Commission also takes account of any alterations which the parties may make to such agreements or practices. Cultural benefits may constitute advantages for consumers under this rule. Lastly, under Article 151(4) of the EC Treaty, a cross-border book price-fixing agreement cannot be exempted unless the agreement or practice in question satisfies all the conditions laid down in Article 81(3) of the EC Treaty, and this presupposes, among other things, that the cultural benefits adduced are clearly shown to exist".

[625] Nevertheless, a thorough analysis of RPM schemes and cultural considerations by the Commission would be useful, also in order to assess whether cultural diversity and consumers' benefits can be always regarded as overlapping.

subsidisation[626] – and therefore considered as a legitimate means –, on the other hand the one on the contrary pointing out the inefficiencies arising from the application of fixed prices[627].

Regardless of the standpoint adopted towards the usefulness and the appropriateness of FBP – which has been also questioned at the national level by domestic antitrust authorities[628] –, what appears worth pointing out, in a work devoted – in general terms – to the analysis of the impact of cultural considerations on competition law, is that Art.167(4) can be used for different purposes, which at times might not be easily combined. Indeed, depending on the meaning attributed to the cultural mainstreaming clause – or rather, depending on the part of the latter the focus is placed on – it will be possible to ensure, through the same provision, both the conservation and the dissemination of Member States' culture, two goals which can conflict with each other. For this reason, if the case of FBP is examined, the approach of the Commission is not surprising: indeed, the latter does not accept – except when cross-border effects are not produced, therefore showing some kind of deferential approach towards FBP applied at the national level[629] – the schemes

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[626] More specifically, cross-subsidies – caused by the excess of revenues conferred by fixed prices and coming mainly from works commercially appealing – could be used to publish works of cultural interest but not capable of attracting a large audience, therefore ensuring greater bibliodiversity.

[627] The literature on this topic, both economic and legal, is extremely rich. For an overview see, among others, VAN DER PLOEG, F.*, Beyond the Dogma of the Fixed Book Price Agreement*, in *CESifo Working Paper No. 949*, 2003, RINGSTAD, V., *On the cultural blessings of fixed book prices: facts or fiction?* in *International Journal of Cultural Policy*, 2004, vol.10, issue 3, 351-365, MELI, V., *La resale price maintenance nel commercio librario. Limitare la concorrenza per promuovere la cultura?* in *Mercato Concorrenza Regole*, 2013, issue 1, 149-179.

For a recent and comprehensive study on the effects of fixed book prices, see WILLIAMS, R.J., *Empirical Effects of Resale Price Maintenance: Evidence from Fixed Book Price Policies in Europe*, in *Journal of Competition Law & Economics*, 2024, vol.20, issue 1-2, 108-136.

[628] Indeed, due to the competition concerns shown by the Commission against industry agreements, many countries (such as Italy, Austria, Germany and the Netherlands) adopted legally binding fixed book price systems, which were soon examined by national antitrust authorities. See for example the position of the Italian *Autorità Garante della Concorrenza e del Mercato* (AGCM), highlighting the negative repercussions of the limits established for the discounts applied by distributors on the final books' prices and, consequentially, on consumers' purchasing power (see more specifically the observations presented by the AGCM's Secretary General Arena before the Italian Chamber of Deputies in 2019, available here. However, despite the observations delivered by the AGCM, in 2020 the law 13 February 2020, n.15 was enacted, establishing a 5% limit for discounts applied by the distributor).

Some skepticism towards fixed book prices schemes was also shared by the German *Monopolkommission,* which in 2018 published the special report *Fixed book prices in a changing market environment.* Here, also referring to experience of countries (such as the UK or Switzerland) which abandoned FBP schemes, the German authority recommended the abolition of statutory rules on fixed book prices, representing the imposition of prices a serious market intervention lacking a well-defined cultural protection goal.

[629] Indeed, as recalled by MELI, V., *cit.*, FBP schemes represent quite a peculiar case, in which the Commission – in order to avoid conflicts with Member States having a long story of RPM mechanisms in the book sector – preferred not to condemn the latter as a whole, considering them as contrasting with the Treaty, and decided to block them only when cross-border effects were

adopted by Member States, and that because of the focus on the Art.167's component focusing on dissemination, a goal which – as underlined also in the aforementioned *EBU/Eurovision* case[630] – might moreover coincide with the market integration one. In other words, weight is undeniably given to cultural considerations, but declined in a specific way, not in line with the approach followed by Member States.

RPM schemes in the book sector then cast light on the complex nature of culture-related considerations, showing that the integration of the latter in competition law will be more or less smooth depending on the specific cultural objective concretely pursued: indeed, when dissemination of national cultures is targeted, the balancing with competition interests will be easier, and that in the light of the already underlined possible overlap with the market integration goal.

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produced. A similar kind of approach was also followed by the CJEU in examining national statutory provisions fixing books' prices: indeed, the Court – in assessing the compatibility of these provisions with the Treaty – decided to move from the competition realm to the one of free movement of goods, in order to focus mainly on the aspects potentially impacting on intra-EU trade and not on the restrictions to apply discounts as such. After having excluded the possibility to resort to the "effet util" principle (see footnote n. 61), the Court decided to focus on the FBP's consequences in terms of violation of the principle of free movement of goods. This emerges for example if the assessments of the French *Loi Lang* are examined: here the CJEU found the law's provisions having a restrictive effect on importations as violating Art.34 TFEU, without the possibility of resorting to Art.36, the latter deemed as incapable of comprehending interests related to consumers' protection or to diversity in the book sector. More specifically, as affirmed in case C-229/83, *Leclerc v. Au blé vert* [1985], EU:C:1985:1, two kinds provisions were considered as constituting measures equivalent in effect to quantitative restrictions on imports: "provisions whereby the importer responsible for complying with the statutory requirement to deposit one copy of each imported book with the authorities, that is to say the principal distributor, is responsible for fixing the retail price" and "provisions requiring the retail price fixed by the publisher to be applied to books published in the Member State concerned and re-imported following exportation to another Member State". However, in this second case, no infringement was to be found – in the Court's perspective – if it was possible to establish that the books were exported for the sole purpose of re-importation. Hence, the CJEU did not declare the general incompatibility of statutory FBP schemes with the Treaty: what appears also interesting that – as emerging from case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH* [2009], ECLI:EU:C:2009:276 – Art. 167 was referred to in order to provide a "positive" protection of FBP schemes adopted at the national level. Indeed, it was specifically affirmed that: "Article 151 EC, which provides a framework for the activity of the European Community in the field of culture, cannot be invoked, as was observed by the Advocate-General, as a provision inserting into Community law a justification for any national measure in the field liable to hinder intra-Community trade. However, the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it" (points 33-24).

[630] The possible overlap of cultural dissemination and market integration is pointed out by TOWNLEY, C., cit.

3. Between culture, competition and copyright: the case of geo-blocking

The case of FBP can be then considered as exemplificative of the need to clarify which facet of the overall cultural dimension is taken into account when assessing the dynamics between the latter and the enforcement of competition law. The complex nature of cultural considerations – and the issues which can arise in the attempt to define the latter – also emerges when analysing the issue of geo-blocking prohibition and exemption for copyright protected works, showing once more a tension between different goals which can be reconnected more in general to the achievement of cultural objectives. More specifically, what can be detected in the copyrighted works' exemption is a potential contrast between the production of cultural contents and access to culture: in this scenario, as it will be explained, a restriction to competition law is allowed with the alleged aim to protect the former, but it might end up jeopardising the latter.

3.1 Digital Single Market, geo-blocking practices and their conflict with fundamental freedoms and competition : a focus on licensed copyrighted works

With the advent of new technologies, a digitized *pendant* to the internal market was created, namely the Digital Single Market (DSM). The well-functioning of the latter, however, was soon found to be jeopardised by the so-called geo-blocking practices, namely instruments through which private actors operating in a country deny access to their online offer by customers located in a different country. In more practical terms, the access restrictions can consist in the denial to sell to a buyer based in a different State *tout court* or in either the modification of terms of sale on the basis of the buyer's country or the re-routing to the version of the website specifically designed for the country the buyer is located in[631].

When it comes to the reasons behind the resort to geo-blocking, two main aspects should be considered.

First of all, in the e-commerce field, geo-blocking enables the private operators to differentiate their prices according to the customers' location in order to maximise profits, in this way clearly creating barriers between countries – given that a price different from the original one will be possibly charged to foreign customers – and impacting on the integrity of the market (but also on consumers' welfare, when the sales' terms in their country are worse).

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[631] As recalled by DI GREGORIO, G., *Regulating geo-blocking discriminatory practices in the digital single market*, in PARCU, P.L, BROGI, E. (eds), *Research Handbook on EU Media Law and Policy*, 2021, 190-207, at 192, however, these restrictions have negative repercussions not only on the digital market but also on the offline one, and that in the light of the fact that goods and services are often sold through online channels.

Secondly, in the area of licensing copyright agreements, the use of geo-blocking techniques might represent a useful tool to enforce territorial copyright restrictions. Indeed, while the dissemination of online contents is characterised by a cross-border dimension, copyright still represent a national discipline, despite the efforts towards harmonisation carried out at the European level[632]: geo-blocking is then used to address this fragmentation, which represents a physiological consequence of the legal framework and not a segmentation artificially created by private operators.

Apart from concretely jeopardising the smooth functioning of the single digital market, the geo-blocking practices – because of the discrimination of EU citizens on the basis of their location –, also violate Art. 18 TFEU, which prohibits exactly discriminations based on nationality, and Art. 26 TFEU, according to which the internal market is characterised by the absence of internal frontiers and by the free movement of goods, persons, services an capital. The reference to these provisions might appear undue, and that in the light of the fact that the geo-blocking restrictions are imposed by private parties and not by Member States' public authorities. With regard to that, it shall be nonetheless recalled that the CJEU has over the years extended the duty not to limit these fundamental freedoms also to private actors[633]: indeed, the Court, from the 1970s onwards, with the *Walrave* ruling, started to underline that also private restrictions could undermine the creation of an internal market, therefore extending the obligation to respect the free movement obligations also to private actors in order to frustrate the internal market goals[634]. At

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632 See the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (so-called "InfoSoc Directive), OJ L 167/10, 22.6.2001, and the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and related rights in the Digital Single Market (CDSM) and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92, 17.5.2019. The CDSM directive represents the last and most significant intervention of the European legislator in this sector.

633 On the horizontal effects of the free movement provisions see UTRILLA FERNÁNDEZ-BERMEJO, D., *Market freedoms and private interactions under EU law*, in *China-EU Law Journal*, 2019, vol. 6, 141-162, SCHEPEL, H., *Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: on the Horizontal Application of the Free Movement Provisions in EU Law*, in *European Law Journal*, 2012, vol. 18, issue 2, 177-200., VERBRUGGEN, P., *The Impact of Primary EU Law on Private Law Relationships: Horizontal Direct Effect under the Free Movement of Goods and Services*, in *European Review of Private Law*, 2014, vol. 22, issue 2, 201-216.

634 Case 36/74, *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974], ECLI:EU:C:1974:140, paras. 27-18: "the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law". In the same direction, see also Case C 415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECLI:EU:C:1995:463; Joined cases C-51/96 and C 191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée* [2000], ECLI:EU:C:2000:199. For a more recent case, dealing with cross-border e-commerce, see Case C 108/09 *Ker-Optika bt v ÀNTSZ Dél-dunántúli Regionális Intézete* [2010], ECLI:EU:C:2010:725.

the same time, it is important to stress that, this case law notwithstanding, the horizontal effects of such fundamental freedoms have not been generally recognized yet, therefore making secondary law fundamental in order to effectively prevent discriminatory business conducts[635].

Also – especially in the light of the subject of the present work – geo-blocking practices shall be framed within their relationship with EU competition law rules, more specifically with Art. 101 and 102 TFEU[636], which were again found to have a horizontal effect between private parties[637]. Indeed, these restrictions often represent the product of agreements between producers and distributors which make it harder on the one hand for the distributor to export, on the other hand for a potential buyer to purchase from distributors located in a different Member States, and which are likely to be considered as a restriction of competition by object[638]. However, it should be also recalled that a "safe harbour" can be provided by the Vertical Block Exempt Regulation (VBER), which allows territorial restrictions meeting specific requirements[639], even though contractual restrictions of the territory into which a distributor can sell the relevant goods are likely to be considered as a hardcore restriction of competition under the VBER, which provides for only a limited number of exceptions.

Given this general tension between geo-blocking and competition law[640], agreements concerning licensed copyrighted works and their compatibility with

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[635] In these terms DI GREGORIO, G., cit., 195, who refers in particular to Art. 20 of Directive 2006/123/EC, the so-called Services Directive, which set an obligation for Member States to implement the prohibition to discriminate EU customers on the basis of their nationality.

[636] For a preliminary study of the impact of competition law on the new rules on geo-blocking practices see M. POIARES MADURO *et al.*, *The Geo-Blocking proposal: Internal market, Competition law and Regulatory aspects*, Study for the internal Market and Consumer Protection (IMCO) Committee of the European Parliament, 2017, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2017/595362/IPOL_STU(2017)595362_EN.pdf.

As recalled in this Study, it shall be underlined that competition law also imposes indirect prohibitions of geo-blocking practices, as shown for example by the Pierre Fabre case (Case C 439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011], ECLI:EU:C:2011:649), in which the Court considered the ban on internet sales imposed by the producer on distributors as a restriction by object.

[637] Case C 127/73, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior* [1974], ECLI:EU:C:1974:25.

[638] Joined cases C 501/06P, C 515/06P and C 519/06P *GlaxoSmithKline Services Unlimited v Commission of the European Communities and Commission of the European Communities v GlaxoSmithKline Services Unlimited and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities* [2009], ECLI:EU:C:2009:610.

[639] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VBER), OJ L 134, 11.5.2022, 4 – 13.

[640] For a closer look on the general dynamics between geo-blocking and competition law see, among others, PICHT, P.G., *The EU Geo-Blocking Regulation from a Competition Law Perspective*, in *Journal of European Competition Law and Practice*, 2020, vol. 11, issue 5-6, 244-246., M. MESSINA, *Geo-blocking and*

competition discipline are worth a separate discussion, and that also in order to better understand the reasons which led to exclude copyrighted works from the scope of the Geo-Blocking Regulation of 2018.

Indeed, when these agreements are at stake, a tendency to justify territorial segmentation can be detected, once more because of the territorial nature of copyright in the EU: as anticipated, even though the principle of territoriality had been in the past attacked by resorting to EU law, the attempts to demolish copyright borders in the end proved to be in fact unsuccessful[641]. This emerges in particular from the CJEU's case law, starting from the *Coditel* case[642], where the Court affirmed that territorial copyright licenses for the broadcast of a movie were not contrary to the rules on the freedom to provide services because of the essential aim of copyright – namely remunerating the author – and because of the existence of national monopolies characterizing the broadcasting market, making territorial licenses inevitable[643]. At the same time, however, in *Coditel II* the CJEU – even admitting that territorial segmentation might be justifiable in certain industries – also invited the referring national court to consider elements such as the duration of the contract or the actual need of the industry at stake, in order to avoid undue restrictions[644].

EU Competition Law in the Digital Era, in A.M LOPEZ RODRIGUEZ *et al.* (eds), *Legal Challenges in the New Digital Age*, Leiden, Brill, 2021, 13-28, G. MONTI, *Keeping Geo-blocking Practices in Check: Competition Law and Regulation*, in CLAICI, A., WAELBROEAK, D., *Vertical Restraints in the Digital Economy*, 2021, Alphen aan den Rijn, Kluwer Law International.

[641] SCHMIDT-KESSEN, M.J., *EU Digital Single Market, Digital Content and Geo-Blocking: Costs and Benefits of Partitioning EU's Internal Market*, in *Columbia Journal of European Law*, 2018, vol. 24, 561-576, 570.

[642] Case 62/79, *Coditel v. Ciné-Vog Films* [1980], ECLI:EU:C:1980:84.

[643] Ibid., paras. 15-16: "Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States. 16 The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the Member States largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable".

[644] Case 262/81, *Coditel v. Ciné Vog Films* [1982], ECLI:EU:C:1982:334, paras 19-20: "It must therefore be stated that it is for national courts, where appropriate, to make such inquiries and in particular to establish whether or not the exercise of the exclusive right to exhibit a cinematographic film creates barriers which are artificial and unjustifiable in terms of the needs of the cinematographic industry, or the possibility of charging fees which exceed a fair return on investment, or an exclusivity the duration of which is disproportionate to those requirements, and whether or not, from a general point of view, such exercise within a given geographic area is such as to prevent, restrict or distort competition within the common market. 20 Accordingly, the answer to be given to the question referred to the Court must be that a contract whereby the owner of the copyright in a film grants an exclusive right to exhibit that film for a specific period in the territory

The need to avoid a too broad justification for territorial restrictions, already surfacing in *Coditel II*, can be also detected in another landmark ruling delivered by the CJEU in 2011[645], regarding British publicans purchasing decoders in another Member States (Greece) to retransmit Premier League matches in their pubs, in this way avoiding the high fees placed by Sky UK for the same services upon UK-based customers. As a consequence, the Football Association Premier League (FAPL) complained that the resale of decoders marketed in Greece would jeopardise the geographical exclusivity of its licenses and, therefore, the value of its rights.

Here the Court seemed to be less receptive to the argument according to which territorial restrictions were functional to preserving the exclusivity of licenses and, consequently, the rights of copyright holders, showing then an approach to a certain extent different from the one adopted in *Coditel*: indeed, in the perspective of the CJEU, exclusive licence agreements concluded between a holder of intellectual property rights and a broadcaster, obliging the latter not to supply decoding devices conceding access to the copyrighted material outside the territory covered by the agreement itself[646], constitute violation of Art. 101, leading to a restriction of competition[647]. More specifically, in the CJEU's perspective, even though the function of copyright is ensuring its holder the right to exploit it commercially, the remuneration coming from this exploitation has to be appropriate[648] and reasonable[649]: on these grounds, contractual restrictions imposed on the export of

of a Member State is not, as such, subject to the prohibitions contained in Article 85 of the Treaty. It is, however, where appropriate, for the national court to ascertain whether, in a given case, the manner in which the exclusive right conferred by that contract is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market, regard being had to the specific characteristics of that market".

645 Joined cases C 403/08 and C 429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* [2011], ECLI:EU:C:2011:631.

646 More specifically, the agreement in *Murphy* constitutes an agreement forbidding passive sales, which are described by Art.1, para.1, lett. m), as "sales made in response to unsolicited requests from individual customers, including delivery of goods or services to the customer, without the sale having been initiated by actively targeting the particular customer, customer group or territory, and including sales resulting from participating in public procurement or responding to private invitations to tender". On the other hand, active sales "means actively targeting customers by visits, letters, emails, calls or other means of direct communication or through targeted advertising and promotion, offline or online, for instance by means of print or digital media, including online media, price comparison services or advertising on search engines targeting customers in particular territories or customer groups, operating a website with a top-level domain corresponding to particular territories, or offering on a website languages that are commonly used in particular territories, where such languages are different from the ones commonly used in the territory in which the buyer is established" (VBER, Art. 1, para. 1, lett. l).

647 *Murphy*., para. 134.

648 *Ibid.*, para. 108.

649 *Ibid.*, paras. 109-110.

decoding devices would be considered not proportional and therefore considered as violating Art. 101[650].

However, neither in this ruling the Court considered as a restriction by object the mere fact that a right holder granted to a sole licensee the exclusive right to broadcast: on the contrary, its conclusions were only focusing on the additional obligations intended to guarantee compliance with the territorial limitations that were contained in the clauses of the contracts concluded between the rights holders and the broadcasters concerned (namely the obligation placed upon the latter not to supply decoding devices for use outside the territory covered by the license agreement)[651].

In other words, *Murphy* does not represent the victory of market integration concerns over copyright holders' rights, on the contrary reaffirming the need to find a balance between these two elements, with all the consequences in terms of legal certainty[652].

3.2 The 2018 Geo-blocking Regulation: the exclusion of copyrighted contents

In order to ensure the respect of the EU free movement principles, by removing the distortions brought by the geo-blocking practices, an *ad hoc* Geo-blocking Regulation was approved in 2018[653], also in the light of the incapability of competition provisions of compelling by themselves an economic operator to make sales in a different Member States when this choice it is not the result of an anticompetitive agreement and when the restrictions are put in place by non-dominant undertakings[654] (even though – however – competition rules' enforcement can still in contribute to the achievements of the Digital Single Market Strategy's

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[650] However, the publicans' victory was in the end a hollow one. Indeed,

[651] *Murphy*, para. 141. More specifically, "Such clauses prohibit the broadcasters from effecting any cross-border provision of services that relates to those matches, which enables each broadcaster to be granted absolute territorial exclusivity in the area covered by its licence and, thus, all competition between broadcasters in the field of those services to be eliminated" (*Ibid.*, para. 142).

[652] On the complexity of this balancing act see VESALA, J., *Geoblocking Requirements in Online Distribution of Copyright-Protected Content: Implications of Copyright Issues on application of EU Antitrust Law*, in *Michigan State International Law Review*, 2017, vol. 25, 595 ff., 615.

[653] Regulation (EU) 2018/302 of the European Parliament and the Council of 28 February 2018, on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC. OJ L 60I, 2.3.2018, 1-15.

[654] See European Commission, Report from the Commission to the Council and the European Parliament, Final report on the E-commerce Sector Inquiry, SWD(2017) 154 final, 10.5.2017, at 49: "Geo-blocking measures based on unilateral decisions by non-dominant companies fall outside the scope of Article 101 TFEU, whereas geo-blocking measures based on agreements or concerted practices between distinct undertakings may be caught under Article 101 TFEU".

objectives[655]): the 2018 Regulation then fills this gap, at the same time representing an example of the aforementioned secondary legislation needed to ensure the respect of fundamental freedoms in the light of a lack of horizontal effects generally recognized to them.

Already from Art. 1(1), it clearly emerges – however – how the 2018 Regulation does not aim at banning any form of geo-blocking, on the contrary setting as its goal the well-functioning of the internal market, the latter to be achieved "by preventing unjustified geo-blocking and other forms of discrimination based, directly or indirectly, on the customers' nationality, place of residence or place of establishment"[656].

This general – somehow cautious – approach is also mirrored by the significant choice not to include copyrighted works within the scope of the Regulation – or to apply to them only certain provisions of it[657] –, a choice which seems to be consistent with the perspective adopted by some stakeholders[658] and Member States[659] and which – however – appears to be less impactful than a proposal made by the European Parliament's Committee on Culture and Education which was aiming at specifying that the Regulation would not affect the principle of territoriality

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655 For a thorough analysis of competition rules' possible contribution to achieving the goals of the DSMS see IBÁÑEZ COLOMO, P., *Copyright Licensing and the EU Digital Single Market Strategy*, in BLAIR R.D., SOKOL D.D. (eds), *The Cambridge Handbook of Antitrust, Intellectual Property and High Tech*, Cambridge, Cambridge University Press, 2017, 339 ff.

656 Geo-blocking Regulation, Art. 1, para. 1. More specifically, the Regulation appears to be built on four pillars, namely equal treatment in the access to online interfaces (Art. 3), in the access to goods or services (Art. 4), in the range of means of payment accepted by the trader (Art. 5), and prohibition of agreements on passive sales (Art. 6).

657 Indeed, it must be recalled that, while audiovisual services are completely exempted from the Regulation, for what concerns non-audiovisual services, the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter (e.g. e-books and videogames), the exception is only to the non-discrimination rule under Article 4, para. 1, lett. b ("A trader shall not apply different general conditions of access to goods or services, for reasons related to a customer's nationality, place of residence or place of establishment, where the customer seeks to receive electronically supplied services from the trader, other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form") : the other provisions of the Regulation, on the other hand, will apply. This was also confirmed by the Commission First Review Working Document, according to which, in spite of the exception enshrined in Article 4, para. 1, lett. b), 'non-audiovisual electronically supplied services remain subject to all other provisions in the Regulation, including the prohibition to block or limit access to online interfaces on the basis of the nationality, residence or establishment of the customer and the discrimination of some electronic payment means only on the basis of their nationality".

658 With specific regard to the audiovisual sector, which will be examined in the next sub-section, see for example FIAD, *European Film Distributors Voice Concerns about Potential Outcomes of Digital Single Market Strategy*, FIAD Press Statement, 7.5.2015.

659 As recalled by TRIMBLE, M., *The EU Geo-blocking Regulation*, Cheltenham, Edward Elgar, 2024, 153.

of copyright[660]. It must be noted, nonetheless, that – even before the 2018 Regulation – services involving intellectual property rights were also outside the scope of the non-discrimination provision enshrined in Art. 20 of the Services Directive[661]: more in general, Recital 95 of the latter clearly states that "The non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory does not constitute unlawful discrimination", showing some kind of recalcitrance to compromise the territoriality of copyright for the sake of the internal market's integrity.

Even after the approval of the 2018 Regulation, the special treatment of copyrighted contents (both audiovisual and non-audiovisual, even though the focus here will be on the first category[662]) kept on representing a hotly debated topic, also in the light of the relevance of the audiovisual sector within the broad category of e-commerce, as already underlined by the Commission in 2017[663] and as also confirmed in the latest *European E-Commerce Report*[664], proving once more the inevitable frictions between copyright – and consequent fragmentation – and unity of the internal market.

3.3 The ongoing debate on the audiovisual sector

A proof of the pivotal relevance of this significant limitation of the scope of the Geo-blocking Regulation can be considered the short-term review carried out by the

[660] European Parliament, CULT, *Opinion of the Committee on Culture and Education for the Committee on the Internal Market and Consumer Protection on the proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2016/0152(COD)*, 24.1.2017. More in detail, the amendment n. 6 was introducing a new Recital 6a, stating that: "In its report on the evaluation of this Regulation the Commission should take into account that the principle of territoriality remains an essential element of the copyright system in the Union and that the approach for tackling geo-blocking and fostering online crossborder services should therefore be balanced against the need to protect cultural diversity and the economic model of cultural industries"

[661] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, 36 ff.

[662] For a detailed analysis of the non-audiovisual works, see TRIMBLE, M., *The EU Geo-blocking Regulation*, cit., 246-251.

[663] Commission staff working document *Geo-blocking practices in e-commerce: issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*, p. 8: "The online delivery of digital content, such as films, TV series, broadcasts of sport events and music, is one of the biggest e-commerce sectors in the EU. It accounts for 33 per cent of online trade by individuals.9 38 per cent of individuals reported that they use the internet to access media online in 2014, up from 21 per cent in 2007, and 16 per cent that they purchase online, up from 9 per cent".

[664] Amsterdam University of Applied Sciences, Centre for Market Insights, *European E-Commerce Report 2024*, available at https://ecommerce-europe.eu/wp-content/uploads/2024/10/CMI2024_Complete_light_v1.pdf, p. 13, where multimedia services come right after the category "Clothes, shoes or accessories" among the most purchased products.

Commission in 2020, as provided for by the review clause contained in Art. 9 of the Regulation itself[665].

More specifically, in the first short-term review, presented in 2020[666], the Commission, in assessing the need to eliminate or narrow down the exemptions to the Regulation and the exception to its Art. 4, para. 1, lett. b, specifically addressed – among other elements – the potential impact of an extension of the Regulation's scope on the audiovisual industry. After having underscored the economic relevance of the latter, the Commission pointed out the peculiar features of it[667], namely its being subject to sector-specific Regulation at the EU level and not to the general principles of the Services Directive[668] and the use of the copyright licensing to raise production financing before the actual production, to then highlight the contrast between the limited availability of audiovisual contents online and the increasing demand for cross-border access to them. Affirming that – however – an extension of the Regulation would not automatically ensure the cross-border access to new online audiovisual contents, and that in the light of the fact that traders would always have to hold the so-called "requisite rights" to the copyrighted protected content in order to be obliged to provide the service[669], the Commission did not reach a final

[665] Art. 9, according to which "By 23 March 2020 and every five years thereafter, the Commission shall report on the evaluation of this Regulation to the European Parliament, the Council and the European Economic and Social Committee. In doing so, the Commission shall take into account the overall impact of the Regulation on the internal market and cross-border e-commerce, including, in particular, the potential additional administrative and financial burden for traders stemming from the existence of different applicable regulatory consumer contract law regimes. That report shall, where necessary, be accompanied by a proposal for an amendment of this Regulation, in light of legal, technical and economic developments". A specific reference to copyrighted materials is present at para. 2, according to which: "The first evaluation referred to in paragraph 1 shall be carried out, in particular, with a view to assessing the scope of this Regulation, as well as the extent of the prohibition laid down in point (b) of Article 4(1) and whether this Regulation should also apply to electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form, provided that the trader has the requisite rights for the relevant territories".

[666] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the first short-term review of the Geo-blocking Regulation, COM(2020) 766 final, 30.11.2020.

[667] See the detailed impact analysis of a change to the scope of the Regulation on the audiovisual sector contained within the Commission Staff Working Document accompanying the report, SWD(2020) 294 final, 30.11.2020, pp. 56-58.

[668] Directive 2006/123/EC of the European and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, 36 ff.

[669] Report on the first-term review, p. 7: "For services that provide access to copyright-protected works26 (such as services providing access to music, video games, or films), the review clause of the Regulation specified some particular aspects to be taken into account. In particular, the Regulation provides that the assessment of any scope-extension should require that a trader making any such works accessible across borders must hold 'the requisite rights in the relevant territories'. This implies that consumers may access online content services in other Member States only if the service provider holds the rights for their territories. This approach is broadly consistent with the intervention logic of the Regulation, and leaves copyright law unaffected".

conclusion on the need (or the desirability) of modifying the scope of the Regulation to include the audiovisual sector, on the contrary recalling the complexity of the issue and referring to a further assessment to be carried out in the future.

Being aware of the criticalities arising from an extension of the Regulation (or from the limited scope of it), and in the light of the level of expertise required to address the needs of both the audiovisual industries and the consumers, in the same report the Commission also launched a dialogue with the stakeholders, which ended in December 2022. What emerges from the position papers sent by consumers' association and representatives of the audiovisual industry within the framework of this institutional dialogue is once more the contrast between the need for territorial licensing and the European consumers' requests for cross-border access, a contrast addressed also through innovative tools such as the creation of a transactional video on demand (TVOD) service for publicly funded audiovisual works produced in the EU[670], through the promotion of cross-border access to out-of-commerce works[671] or by allowing cross-border access to publicly funded AV works on publicly-funded online platforms set by National Film Funds[672]. However, the existence of exclusive territorial licensing practices is never put into doubt, and the most recent interventions by the European institutions also appear to be reluctant to modify the scope of the Geo-blocking Regulation with regard to the AV sector and – consequently – to reinterpret copyright rules in order to find a balance between the interests of rights' holders and EU audiences' ones. This approach was by last shown by a European Parliament's vote of December 2023, which on the one hand led to the adoption of an IMCO own-initiative report on the implementation of the 2018 Regulation[673] but, on the other hand, also passed a number of amendments aiming at excluding AV content from the scope of a possible review[674]. In spite of the need

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[670] See COMMUNIA ASSOCIATION FOR THE PUBLIC DOMAIN, *Proposal for a fallback* TVOD *service for publicly funded AV works*, where this TVOD service is aiming a providing a single distribution mechanism for those territories which are deemed to have a scarce economic potential.

[671] NL FILMFOND AND EYE FILMMUSEUM, *Possible solutions for stimulating cross-border distribution of audiovisual works in the EU*.

[672] EUROPEAN FILM AGENCIES, *EFAD response to Giuseppe Abbamonte's letter on the Stakeholders dialogue on cross-border availability and access to audiovisual content across the EU*.

[673] COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION, *Report on the implementation of the 2018 Geo-blocking Regulation in the digital single market*, 7.11.2023. However, it shall be underlined that the CULT was rather cautious in assessing the relationship between rights' holders' protection and cross-border access, recognizing that territorial licensing would likely remain, in the short and medium term, the primary model for content distribution, but at the same time acknowledging that exceptions to this model might be at times justified in order for example to ensure cross-border access to linguistic minorities, but "without calling into question the territoriality principle in general" (*Id.*, point 2).

[674] EUROPEAN PARLIAMENT, *Resolution on the implementation of the 2018 Geo-blocking Regulation in the digital single market*, 13.12.2023, point 24: "[The Parliament] Considers that the inclusion of audiovisual services in the scope of the Geo-blocking Regulation would result in a significant loss of revenue, putting investment in new content at risk, while eroding contractual freedom and reducing cultural diversity in content production, distribution, promotion and exhibition;

for new solutions aiming at allowing legal cross-border access highlighted by the Parliament[675], no further initiatives have been adopted. At the moment, the only two instruments capable of mitigate the prominence recognized to rights' holders' protection still are the so-called Portability Regulation[676] and the Online Broadcasting Directive[677]. More specifically, the first one allows EU consumers temporarily traveling across the EU to have access to the same online content services to which they have subscribed in the Member State they reside in: since having access to audiovisual contents not licensed in the country where the user is momentarily located would normally amount to a copyright infringement, the Regulation establishes that the service's provision shall be considered as occurring in the subscriber's Member State of residence, then using a legal fiction. However, this Regulation clearly does not enable general cross-border availability of content, on the contrary giving access to the same contents available in a user's Member State when the latter is "temporarily present"[678] in another State: nevertheless, this initiative was greatly opposed by right holders, willing to maintain their full contractual freedom[679].

The same tension with contractual freedom can be detected in the 2019 Online Broadcasting Directive, which once more challenges the territorial exclusivity in the

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emphasises that such an inclusion would result in fewer distribution channels, ultimately driving up prices for consumers;

[675] *Ibid.*, point 25: "In this context, calls on the Commission to propose tangible solutions that will allow consumers, in particular citizens living in cross-border regions or belonging to linguistic minorities, legal access to varying cross-catalogue content across borders; recalls the obligation for the Commission to report on the evaluation of the Geo-blocking Regulation; while acknowledging the need for further assessment of the potential impact on the overall dynamics of the audiovisual sector ensuring sustainable business models for economic operators; recommends that owing to its complexity as a result of factors such as the diversity of content, providers, business models, consumers' preferences, licensing models and complex value chains, the Commission should consider a gradual approach, targeting specific type and distribution models of the audiovisual sector one-by-one, and gather additional evidence before further steps are taken; while assuring realistic timeframes for any potential changes that will allow providers of audiovisual services to adapt their business models properly to the new rules and ensure the preservation of cultural diversity and quality of content".

[676] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content service in the internal market, OJ L 168, 30.6.2017, 1 ff.

[677] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, OJ L 130, 17.5.

[678] *Ibid.*, Art. 2, according to which "temporarily present in a Member State" means "being present in a Member State other than the Member State of residence for a limited period of time", without providing additional details.

[679] EUROPEAN COMMISSION, *Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules – Part 1*, SWD(2016) 301 final, 25.

audiovisual sector[680]. More specifically, this act extended to radio and television broadcasts offered by broadcasting subjects on the internet the so-called country of origin rule, already present in the Satellite and Cable's Directive[681]: according to it, the broadcasted content is regulated only in its country of origin, in spite of the fact that broadcasting signals are received also in other countries, therefore crossing national borders, with the significant consequence that a broadcasting organization will need to acquire licenses only from right holders in the Member State in which the signal is originated.

Consequently, according to the discipline set by the 2019 Directive, broadcasters willing to simulcast (namely broadcasting over the internet simultaneously with their terrestrial broadcasts) will have to require licenses only in their country of establishment. However, it shall be also underlined that – following the great criticism coming from right holders – the scope of the country of origin rule has been significantly narrowed with respect to the initial proposal: indeed, the latter covers only radio programmes and television programmes which are either news and current affairs programmes or fully financed own productions of the broadcasting organisation[682].

Surprisingly, in this unceasing debate surrounding the extension of the Geo-blocking Regulation to the audiovisual sector, no significant reference to Art. 167 TFEU was made, despite the centrality of the concept of cultural diversity, the latter not only considered as significantly impacted by territorial restrictions but also used as an argument to justify territorial restrictions. Indeed, if on the one hand geo-blocking practices are deemed to be affecting access to a more varied cultural offer, it has been also affirmed that removing the latter would directly impact on cultural diversity, and that as small producers would in the end succumb, because of the lack of the financial resources needed to acquire licenses for larger geographical areas, favouring in this way the big players on the market[683].

3.4 The criticalities arising from geo-blocking practices: a new role for Art. 167(4)?

Apart from the different perspectives on the desirability of a removal of such restrictions in terms of guarantee of greater cultural diversity, it seems possible to

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680 This aspect was clearly pointed out in the same Impact Assessment mentioned in the previous footnote, where the territoriality of copyright is considered as a great obstacle to rights clearance, requiring an increase in the number of rights to be cleared (para. 3.1.4).

681 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, 15 ff.

682 Online Broadcasting Directive, Art. 3, para.1.

683 This is for example pointed out by TRIMBLE, M., *Copyright and geoblocking: the consequences of eliminating geoblocking*, in *Boston U. J. Sci & tech*, 2019, vol. 25, issue 2, 476-502, at 498-501.

affirm that – with specific regard to the access to cross-border cultural contents – geo-blocking practices might appear to be controversial for a two-fold reason.

First of all, the fragmentation can be functional to targeting specific language preferences, which are tightly related to national barriers, therefore requiring to "localize" content for different languages. This approach – event though it is true that some consumers tend to prefer local audiovisual content to foreign content[684] – does not take into proper account some elements: first of all, the fact that language proficiency of the audience residing in a Member State does not necessarily follow the borders of that Member State[685], especially given the large number of EU citizens living outside their Member State of origin, and secondly the presence – within the EU – of language minorities, discriminated on the basis of their location (in violation of several provisions of the Charter of Fundamental rights of the European Union[686]) as incapable of accessing cultural contents available in their language[687]. Considering the not automatic overlap of language preferences and national borders, a replacement of territorial rights with language-exclusivity rights have been brought forward, in order to retain the current financing model for the audiovisual sector while extending language offerings across national borders[688].

Also, in more general terms, the prohibition of cross-border access might be considered as contrasting with Art. 167 TFEU, and more specifically with the idea of a common cultural heritage to be brought to the fore: having access to the same cultural contents, apart from the advantages in terms of greater cohesiveness[689] – for example by enabling EU citizens to learn languages spoken in different Member States[690] –, might in the end also contribute to the creation of that common ground

684 See the analysis carried out by GOMEZ, E., MARTENS, B., *Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Film*, in *JRC Technical Reports*, 2015.

685 This is also underlined by MYLLY, U.M., HERRERO, M., *Free Movement of Audiovisual Content for Benefit of European Consumers of Culture*, in *International Review of Intellectual Property and Competition Law*, 2022, vol. 53, 1038-1070, 1057.

686 One might here refer to Art. 11, according to which "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive important information and ideas without interference by public authority and regardless of frontiers", Art. 21, prohibiting any acts of discrimination, and Art. 22, according to which "The Union shall respect cultural, religious and linguistic diversity".

687 The impact of geo-blocking practices on language minorities is examined by REDA, J., *Geoblocking: At Odds with the EU Single Market and Consumer Expectations*, in SZCZEPANIK P. *et al.* (eds), *Digital Peripheries. The Online Circulation of Audiovisual Content from the Small Market Perspective*, Berlin, Springer, 2020, 81 ff.

688 This is the proposal made by HUGENHOLTZ, P.B., POORT, J., *Film Financing in the Digital Single Market: Challenges to Territoriality*, in *International Review of Intellectual Property and Competition Law*, 2019, vol. 51, 167 ff.

689 The contribution to greater cohesiveness is raised by TRIMBLE, M., *Copyright and geoblocking: the consequences of eliminating geoblocking*, 501.

690 Indeed, as underlined by HUGENHOLTZ, P.B., POORT, J., cit., 171, both improving their skills in other languages and accessing contents in their own mother tongue can be listed among consumers' reasons behind the request for cross-border offer of audiovisual products, showing that cross-

which – in the long run – will be likely part of a common European heritage, the latter to be interpreted not only as a pre-existing concept but also as a product of European integration, to be framed in its dynamic dimension.

What emerges from this brief overview is that – some attempts to erode the territoriality of copyright notwithstanding – the audiovisual sector seems to be still attached to the latter, with a rather clear compression of the European audiences' cultural interests. Given that, however, a change of paradigm would probably require an overall change of perspective, also in order to reconsider the actual boundaries of the DSM – which are directly dependent on the choice to reflect consumers' needs or rightsholders' ones[691] –, Art. 167, and more specifically the cultural mainstreaming clause, might contribute to making copyright law more permeable to cultural considerations, abandoning a focus merely on the market (and on economic actors)[692] and re-discovering the need for copyright not to be only concerned with the remuneration for rightsholders, ending up frustrating other objectives – such as access to culture – which might be conflicting with the latter[693].

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border access represent a culturally relevant element for European media consumers: consequently, a consistent share of consumers' cultural demand remains unmet.

[691] Indeed, as highlighted by LOBATO, R., *On the Boundaries of Digital Markets*, in *Digital Peripheries*, cit., 51-62, 59, markets designed for rightsholders – small and characterised by "tightly defined, enforceable boundaries"', differ from the ones designed for consumers, that are likely to prefer larger markets, "with permeable boundaries and no enforcement, except in those instances when drawing the boundary in such a way results in price differences. In other words, according to the Author, there is a clash not only between the material interests of producers and consumers, but also in how these interests map onto the abstract form of the market. The idea of a single audiovisual market, as articulated in the DSM discussions, proved to be divisive rather than unifying, because it brought into focus the many conflicts that arise when a boundary is moved".

[692] For a very insightful exam of copyright between market-based approach and cultural policies see SGANGA, C., *Making room for cultural policies within a market-oriented copyright law: A function-based approach*, in PSYCHOGIOPOULOU, E., SCHOENMAEKERS, S. (eds), *European Union Economic Law and Culture*, Cheltenham, Edward Elgar, 2024, 150 ff.

[693] For a recent comment on copyright as an access right – even though not with specific regard to geo-blocking practices –, see GEIGER, C., JÜTTE, B.J., *Copyright as an Access Right: Concretizing Positive Obligations for Rightsholders to Ensure the Exercise of User Right*, in *GRUR International*, 2024, vol. 73, issue 11, 1019-1035. Interestingly, here the Authors underline the need to provide for specific access obligations into copyright law, and that in the light of the limitation of competition rules in private proceedings and in order to fully realise the horizontal effects of fundamental rights.

Final remarks: a culture-tolerant or culturally oriented market economy?

Competition law does not exist in a vacuum: this concept started to more explicitly emerge right after the Treaty of Lisbon, which made clear – by formalising it into the EU treaties – the need for the Union not to be only an open market economy but also to pursue other objectives such as sustainability, inclusion, social justice, economic, social and territorial cohesion, technological advance and safeguard of cultural diversity[694], therefore considerably impacting on the tasks conferred to the Union. In this deeply transformed context – in which the expression "social market economy" meaningfully appeared for the first time in EU treaty law, already hinting to an attempt to balance economic and social aspects –, the role of competition also significantly changed. In the light of the need to ensure the well-functioning of this now *purposeful*[695] internal market, the latter was indeed soon called to integrate new values and new goals within itself, and more in general to redefine its mission within the overall EU structure. In this renewed and enriched scenario, a more prominent role started to be played by political considerations and by the EU's most openly political institution, namely the Commission, leading to deep transformations of competition law which appear to be still ongoing, and that exactly in the light of the weakening of the "unifying role" played by the Court of Justice – traditionally guiding the development of competition discipline – and in view of the greater relevance acquired by new goals, the achievement of which depends on precise political choices[696], and that because – as recalled by former

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[694] See Art. 3 TEU.

[695] This is the adjective used by GOVAERE, I., *Internal Market Dynamics: On Moving Targets, Shifting Contextual Factors and the Untapped Potential of Article 3(3) TEU*, in GARBEN, S., GOVAERE, I., *The Internal Market 2.0*, Oxford, New York, Hart, 2020, 83-84. More specifically, according to the Author, the «strong proactive and purposeful wording of the internal market objective» within Art. 3 TEU «expresses a strong assertion that the internal market shall be established and thus 'proactively' pursued. Moreover, Article 3(3) TEU dictates that such a purposeful internal market shall also proactively pursue other higher and horizontal Treaty objectives. The Lisbon Treaty thus provides the necessary, but seemingly also a compulsory, legal framework for the establishment of a more proactive internal market policy which positively intertwines with other EU policies».

[696] In these terms GERBER, D. J., *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford, Oxford University Press, 1998, 390-391, who more precisely underlines that: «The image of a self-confident Commission enforcing an increasingly clear set of well-accepted legal principles under the forward-looking and bold guidance of a court confident in its objectives and methods can no longer be considered persuasive. The system is more convincingly portrayed as featuring an understaffed and somewhat uncertain Commission facing new problems, pressures and demands with diminishing guidance from the courts and increasingly tentative support for its mission. The defining features of the Community competition law system - integration as the dominant goal and juridical processes as the central source of guidance in decision-making - have mutated. The reduced role of the unification imperative and the weakening of the 'juridical' components of the system in favor of 'political' components are transforming the system. As yet, however, these mutations have been little noticed. In a unified market the goal of unification loses its meaning, but the implications of this loss of meaning remain virtually unexplored».

European Commissioner for Competition van Miert – "Competition policy is not something neutral, it is politics"[697].

This is the backdrop upon which the dynamics between competition and cultural concerns unfold; as anticipated, however, a clear divide shall be drawn between cases of incompatibility – therefore requiring exceptions in order to enable the coexistence of such elements – and cases of possible integration between these two elements, and more specifically between State aid discipline on the one hand and mergers and anticompetitive agreements on the other.

With specific regard to State aid, for starters it seems worth underlining that the broader goals listed by Art. 3 TEU appear to be indirectly recalled by Art. 107(3) TFEU which, as it has been previously pointed out, provides for the possibility to consider compatible with the internal market certain categories of public support measures, including the ones targeting culture and heritage conservation activities.

It is then clear that, besides the general prohibition of State aid, the possibility to resort to the latter under specific circumstances, to provide public support to specific sectors, is explicitly acknowledged, therefore admitting the possibility to use State aid as a policy tool to encourage certain economic activities and industrial policies[698], in other words at times also moving from an idea of State aid *control* to an idea of State aid *policy*[699].

With regard to that, in order to show how some kind of nudging towards the adoption of measures supporting certain activities is performed by the Commission, it shall be recalled that recently – with the precise aim to accelerate the achievement of the *Green Deal*'s policy objectives – the new *Guidelines on State aid for Climate, Environmental Protection and Energy* (CEEAG) have been approved by the Commission[700], to revise – as prescribed by the *Green Deal* itself – the State aid

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697 See Van Miert's Confirmation hearing before the European Parliament, 6.1.1995, as cited by BASEDOW, J., *The Modernization of European Competition Law: A Story of Unfinished Concepts*, in *Texas International Law Journal*, 2007, vol. 42, 429 ff., 431.

698 However, as it has been interestingly pointed out with regard to the recent *Draghi report* by RAMAJOLI, M., *Peripezie passate e presenti della tutela della concorrenza*, in *Rivista della Regolazione dei mercati*, 2024, issue 1, 323 ff., 338-339, it shall be borne in mind the need not to consider competition law as subservient to industrial policy, and that in order not to jeopardise the unity of the internal market by enabling Member States to grant subsidies more freely, consequently creating a competition between countries within the EU area.

699 Also, BIONDI, A., *State Aid Is Falling down, Falling down: An Analysis of the Case Law on the Notion of Aid*, in *Common Market Law Review*, 2013, vol. 50, issue 6, 1719-1743., significantly States that: "despite in-depth changes in the way the State and the market operate in contemporary Europe, State aid control is still very much a tool that tries to use legal norms to influence what is still largely a political process".

700 Communication from the Commission – *Guidelines on State aid for climate, environmental protection and energy 2022*, OJ C 80, 18.2.2022, 1 ff., replacing the previous *Guidelines on State aid for Environmental Protection and Energy 2014-2020* (EEAG). On their legal effects see GIEROW, S., *Beyond administrative guidance: legal effects of State aid guidelines and the need for judicial review*, in *European Competition Journal*, 2025, vol. 1, 189-210, who – once more recalling the shift from State aid control to State aid policy

discipline in order for it to take into account environmental policy goals and to back a cost-effective and just transition to climate neutrality, at the same time guaranteeing a level-playing field within the internal market. In more practical terms, these guidelines will guide the interpretation of Art. 107(3)(c) TFEU – namely the provision upon which the compatibility with the internal market of measures having an environmental protection goal is built –, in order to check that the economic advantage is conferred with the aim of promoting the green economy and that the aid has a so-called incentive effect. Without delving into the doubts surrounding the possibility to face climate change through such instruments[701], what can be affirmed is that the choice to promote these *green aid* schemes not only appears praiseworthy – at least theoretically speaking[702] – for its attempt to ensure a smoother implementation of the *Green Deal*, bringing to the fore the role of the States, but might also be considered as coherent with the environmental mainstreaming clause enshrined in Art. 11 TFEU, according to which: «Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development».

However, as it has been pointed out in the third Chapter, even though it is then possible to have compatible public support measures aiming at backing certain activities previously identified in the EU treaties, a line shall be drawn between compatible aid on the one hand, and measures which do not constitute aid at all on the other.

Apart from the practical repercussions arising from it – reference might be here made for example to the need to list State aid measures within national registers in order for them to be effective[703] or to the need to properly qualify a support measure before carrying out its compatibility assessment[704] –, this distinction between compatible aid and non-aid appears to be rather important – for the overall purpose of the present work – when evaluating the degree upon which the EU market

– stresses the possible use of guidelines to push Member States towards what are defined as "good aid".

701 See, among others, SAITO, K., *Marx in the Anthropocene. Towards the Idea of Degrowth Communism*, Cambridge, Cambridge University Press, 2023.

702 Indeed, as recalled by GALLI, L., *L'ira d'Europa per l'I.R.A. d'America, ovvero alcune considerazioni su aiuti di tato e green industrial policy da ambo i lati dell'Oceano*, in *Rivista della Regolazione dei mercati*, 2023, issue 2, 21-55, a danger here might be represented by the State capture by the financed economic actors.

703 Reference here can be made to the Italian *Registro Nazionale degli Aiuti* (RNA), which is the direct consequence of a Common Understanding signed by the European Commissioner for Competition and the Italian undersecretary for European affairs, through which the latter committed himself to establish such a register.

704 Case C-40/23 P, *European Commission v. Kingdom of the Netherlands* [2024], ECLI:EU:C:2024:492.

economy can be considered as *culturally corrected*[705], and more concretely whether a step beyond the compatibility on the basis of Art. 107(3)(d) TFEU is made.

Indeed, as it has been already underlined, even though in the 2016 Notice on the notion of State aid the Commission appeared to have finally acquired awareness of the specificities of the cultural sector – consequently admitting the possibility for certain measures addressing the latter not to fall within the category of aid –, at the same time it also seemed still attached to a purely economic paradigm, the latter widely employed when drawing the divide between economic and non-economic activities (and – therefore – between aid and non-aid).

This approach quite clearly emerges from criteria such as the predominant financing through commercial means, a criterion which – for the reasons already pointed out in the third Chapter – seems uncapable of taking into due account the main aim of the financed activity: indeed, the latter might nevertheless be serving that purely social and cultural purpose which the Commission links to non-economic activities, and while the possibility of covering the expenses through commercial means many cultural realities have to resort to – also given the scarcity of public resources – can be considered as an accidental element, the cultural purpose appears to be an immanent one, worth taking into account when qualifying the financed activity[706].

The scepticism towards the non-economic nature of cultural activities, however, does not come as surprising: indeed, as underlined by the CJEU's case law recalled in the third Chapter, outside the realm of competition might only fall exclusively sovereign functions and exclusively social activities, both to be defined in rather strict terms, once more showing the difficulties to escape from the broad encompassing notion of economic activity and, in more abstract terms, the tendency to resort to a logic grounded on non-economic goals only under exceptional circumstances[707]. This expansion of the economic realm might be considered as hinting to a more general issue, namely the fact that over the years the European economic constitution significantly eroded the States' room of manoeuvre, framing their political choices within a strict economic logic and making them *meta-political*[708]:

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[705] This is the expression used by PSYCHOGIOPOULOU, E., SCHOENMAEKERS, S. (eds), *European Union Economic Law and Culture: Towards a European Culturally Corrected Market Economy*, Cheltenham, Edward Elgar, 2024.

[706] The same Commission Notice on the notion of State aid states, at para. 7: «The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities».

[707] With specific reference to the SGEI system, this was also recently underlined by GRÉGOIRE, G., *The EU's neoliberal constitutionalism(s),* in *European Law Open*, 2025, 40, published online, who also sheds light on the close link between the European economic constitution and the content of neoliberal economic constitutionalism.

[708] The qualification of States' choices as metapolitical can be found in ADALID, S., *Discussion De la constitution économique à la constitution écologique: l'avènement de de la 'méta-politique'*, in GRÉGOIRE, G., MINY, X., *The Idea of Economic Constitution in Europe: Genealogy and Overview*, Leiden, Brill, 2022, 755

in this scenario, with specific regard to cultural and cultural heritage-related activities, European States – traditionally familiar with public support to the cultural sector – will still have to adapt to the principles of the European economic constitution, and that even after the 2016 Notice of the notion of State aid, which appears to be still heavily influenced by it.

In the light of the above, the thesis according to which State aid law would represent an example of *culturally corrected* market economy[709] does not appear wholly convincing, and that because of a not full acknowledgment of the specificities of the cultural sector, which – to a certain extent – the Commission still tries to interpret by resorting to the economic paradigm: in the light of the above, it would seem more suitable to consider the EU market economy as *culture-tolerant*, ready to resort to Art.107(3)(d) in order to declare public support measure to the cultural sector as compatible with the internal market but, at the same time, still recalcitrant to exclude them from the scope of the economic realm.

In other words, it can be then affirmed that, to a certain extent paradoxically, the explicit cultural derogation which can be found in the TFEU – meant exactly to provide a solution for the coexistence of cultural considerations and State aid rules' enforcement, and in more practical terms to make the compatibility assessment of public support measures in favour of the cultural sector more straightforward, without resorting to the cultural mainstreaming clause and carrying out the complex balancing exercise between economic and non-economic considerations required by it – does not appear to be capable of stemming by itself the economic paradigm which still nowadays seems to guide the Commission, which does not seem ready to abandon the concept of compatibility and turn to the one of exclusion from Art.107(1) prohibition.

Also the weak impact on the Commission's decisional practice of the 2016 notice on the notion of State aid, which – as pointed out – was precisely aimed at drawing

ff. More specifically, at 755, the Author affirms that: «La 'constitution économique' est devenue une réalité juridique. L'outil théorique originellement ordolibéral s'est transformé en une technique juridique d'encadrement du pouvoir politique, dans le domaine économique. L'idée de 'constitution économique' a été prise (trop) au sérieux. L'une des fonctions d'une 'Constitution' est d'instituer et d'encadrer l'exercice du pouvoir politique et d'en limiter, par les droits fondamentaux, les choix. Aujourd'hui, la 'constitution économique' s'est vu assigner la même fonction. Mais, là où les 'Constitutions' instituent le pouvoir politique, la 'Constitution économique' le détruit ; car il ne saurait y avoir de pouvoir véritablement politique s'il se voit amputé de sa liberté de choix économiques. Les 'Constitutions' encadrent formellement le pouvoir politique, les 'Constitutions économiques' forment un cadre substantiel, elles préemptent les décisions politiques, elles dictent alors une 'méta-politique'. L'échec ordolibéral initial d'une 'constitution économique' n'a pas empêché l'avènement d'une 'Constitution économique néolibérale'. Le contenu de cette dernière est principalement constitutionnel: transformer l'État pour le soumettre au marché et ainsi permettre l'avènement d'une 'méta-politique', d'une idéologie dominante imposée juridiquement par le droit».

[709] This is the thesis brought forward by GRUYTERS, J., MICHAUX, L., *Cultural State aid: A myriad of approaches*, in PSYCHOGIOPOULOU, E., SCHOENMAEKERS, S., cit., 200 ff.

a clearer divide between "pure" cultural activities, deemed to be not falling within the scope of State aid discipline, and cultural activities on the contrary presenting some kind of economic character, might be considered as a proof of how deeply rooted is the tendency to look at public support to cultural initiatives through the lenses of the economic paradigm, as showed by the attempt made by the Commission itself to unduly stretch the concept of economic activity.

Exactly in the light of how entrenched appears to be the economic paradigm in the Commission's reasoning when evaluating support measures to cultural activities, more heavily resorting to the cultural mainstreaming clause in order to give a more marked prominence to the cultural sector's distinguishing features does not seem a solution either. Indeed, even though the policy-linking clauses require open-textured Treaty provisions to be interpreted to achieve broader policy goals – as also showed by State aid to the sport sector where, lacking an explicit sport derogation, reference to the sport mainstreaming clause of Art. 165 TFEU alone have been used to declare support measures as compatible with the internal market –, it should be also recalled how EU Institutions rather often proved to be prone to mix the economic and the purely cultural component of cultural initiatives, and that also when Art. 167(4) was employed. Also, such provision could be used just to argue in favour of a declaration of compatibility with the internal market, while the possibility of using it to consider certain activities as excluded from the scope of competition rules seems to be more unlikely.

Moving now from the "public side" of competition law to its "private side", while in the State aid case explored in the third Chapter the relationship between competition-related and cultural considerations was found to finally resolve in a mere possibility for these to coexist – even though with all the limitations which had been recalled on several occasions –, some kind of possible synergy can be on the other hand detected if attention is turned to mergers and anticompetitive agreements.

In the first case it has been underlined how cultural considerations can somehow shape the economic paradigm for the safeguard of cultural diversity, and that by introducing qualitative considerations in mergers control, while with regard to anticompetitive agreements the possible complementarity of economic and cultural aspects appears to be more nuanced, and that also because of what has been defined as the "multifaceted nature" of cultural considerations. Indeed, how it has been pointed out in the fixed book prices, while in the Commission perspective, focusing on the dissemination of national cultural products, Art. 101 TFEU represents a tool through which it is possible to achieve cultural diversity objectives – always given, however, the possibility to resort to the general exemption of its third paragraph in order to better comprehend cultural considerations – , according to the Member States, on the contrary more concerned of national cultural diversity conservation, a friction between antitrust rules and cultural diversity objectives can be detected, therefore requiring schemes such as the FBP.

However, focusing now on antitrust rules in general, not only when applied to the cultural sector specifically, the flexibility of the latter – capable of being used for the achievement of a wide range of goals by integrating them within itself and not by excluding them from its scope – clearly emerges from Art. 101 TFEU and its flexible structure[710], meant to evolve according to the needs gradually emerging at both the supranational and the national level.

Indeed, the latter has been used over the years to accommodate a broad range of interests, giving rise – as pointed out in the fourth Chapter - to a still heated debate on the goals of competition law, from more 'traditional' ones, such as economic efficiency and consumer welfare to more innovative objectives, such as the ones related to non-economic interests.

Focusing on the latter, much attention has been recently placed upon the relationship between antitrust and sustainability[711], an attention which finds its *pendant* in State aid discipline in the adoption of the aforementioned guidelines aiming at linking the Green Deal and Art. 107 TFEU.

Looking at the Commission's decisional practice, attempts have been made to streamline environmental considerations in the assessment of anticompetitive agreements, and that mainly by translating into economic terms the environmental benefits arising from such agreements and, more specifically, by linking such environmental benefits to consumer welfare. This emerges from example from the CECED case[712], where the Commission approved an agreement between washing machines' manufacturers aiming at discontinuing the production of machines failing to meet specific energy efficient criteria: in justifying it, however, it appears also worth recalling that – besides the consumers' benefit in terms of energy savings and the increased competition on prices – it took into account also the positive repercussions of the agreement in terms of collective non-economic environmental benefits arising from lower electricity usage and consequent reduction of greenhouse gases emissions.

At any rate, the environmental benefits arising from an agreement might be rather difficult to measure and might as well go against the immediate consumer welfare:

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[710] On the resilience of antitrust law see KALINTIRI, A., *EU antitrust law's resilience: the good, the bad and the ugly*, in *Yearbook of European Law*, yeae009, 2025.

[711] See, among others, KINGSTON, S., *Greening EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2012, NOWAG, J., *Environmental Integration in Competition Law and Free-Movement Laws*, Oxford, Oxford University Press, 2016, HOLMES, S., *Climate Change, Sustainability and Competition Law*, in *Journal of Antitrust Enforcement*, 2020, n. 8, MONTI, G., *Four Options for a Greener Competition Law*, in *Journal of European Competition Law & Practice*, 2020, vol. 11, 124 ff., GASSLER, M., *Sustainability, the Green Deal and Art. 101 TFEU: Where We Are and Where We Could Go*, in *Journal of European Competition Law & Practice*, 2021, vol. 12, 430 ff.

[712] Commission Decision in Case IV.F.1/36.718, CECED, OJ L 187, 24.1.1999, 47.

this was for example showed by a Dutch case in which the national competition authority (ACM) refused to give the green light to an industry-wide agreement meant to promote the retailing of chicken meat produced according to more sustainable and animal welfare-friendly standards, and that because, in its perspective, the additional costs placed on consumers were outweighing the sustainability benefits of the agreement[713].

As made clear by this agreement, environmental benefits cannot always be translated in economic terms, with direct repercussions on the possibility of balancing them with other efficiencies and effects when anticompetitive agreements are evaluated.

In this scenario, the strong wording of the aforementioned environmental integration principle – according to which, as recalled before, environmental protection requirements *must* be integrated in the EU policies and activities – might prove to be helpful in the attempt to provide a sounder basis for the inclusion of such requirements within Art. 101(3) TFEU. Indeed, even though on the one hand Art. 11 TFEU does not seem capable of leading to an automatic prioritisation of environmental over traditionally competition concerns[714], on the other hand it could also enable an extensive interpretation of the fair share requirement of Art. 101(3). Such extensive interpretation was for example favoured by the Austrian legislator who, in amending the equivalent of Art. 101(3) in Austrian antitrust law, introduced the presumption according to which the fair share criterion is automatically met when the efficiency benefits arising from an agreement substantially contribute to an ecologically sustainable or climate-neutral economy[715], showing an approach diametrically opposed to the one followed by the Commission which, in the new

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713 The reference here is to the so-called *Chicken of Tomorrow* case. See the ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', available here.

714 See UFFER, M., *Competition Law: Sustainability Through Competition and Participation*, in PETERS, B., LOHSE, E. J., *Sustainability through Participation? Perspectives from National, European and International Law*, Leiden, Brill, 2023, 252 ff., who also underlines that a balancing of competing interests under Art. 101(3) is capable of ensuring more legitimacy to a possible prioritisation of sustainability concerns with respect to a simple restriction of the scope of Art. 101 when agreements producing environmental benefits are at stake.

715 §2, para. 1, of the Austrian Cartel Act (Kartellgesetz, KartG), as amended by the Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021, BGBl I Nr 176/2021 («Die Verbraucher sind auch dann angemessen beteiligt, wenn der Gewinn, der aus der Verbesserung der Warenerzeugung oder -verteilung oder der Förderung des technischen oder wirtschaftlichen Fortschritts entsteht, zu einer ökologisch nachhaltigen oder klimaneutralen Wirtschaft wesentlich beiträgt»). For a comment see KUBAT, A., TOKIĆ, A., *Sustainability and Competition Law in Austria*, in KËLLEZI, P. *et al.* (eds), *Sustainability Objectives in Competition and Intellectual Property Law*, Berlin, Springer, 2024, 27 ff.

sustainability chapter of the Horizontal Guidelines on the applicability of Art. 101[716], interpreted this criterion quite restrictively[717].

However, setting aside these instructive attempts at the national level, what can be affirmed by turning to the Commission decisional practice is that the latter – in spite of a growing tendency to consider sustainability as a competition law's objective[718] – still appears to refuse the idea of considering the latter as a direct relevant factor to be taken into account in the analysis of the welfare effects of a market conduct[719], acknowledging its importance only when it can be translated into economic terms and into the traditional parameters of competition.

The same difficulty which has been just pointed out of translating environmental considerations into economic terms – which could more easily decoded by competition law – can be detected in the cultural sector, where at times the concept of consumer welfare cannot be reduced to the simple willingness to pay a lower price. This emerged for example from the brief analysis of fixed books' prices carried out in the fourth Chapter, where light was shed on the fact that – while in the Commission's perspective resale price maintenance schemes are just an obstacle to the free unfolding of competition, the latter capable of accruing consumer's welfare through price competition –, the same schemes might contribute to the promotion of cultural diversity, for example by favouring access to greater titles' diversity through cross-subsidisation and by protecting small booksellers which otherwise – if limits to discounts are not imposed – could not compete with bigger distributors.

At any rate, a fundamental difference between non-economic goals related to environment's protection on the one hand and non-economic goals aiming at ensuring cultural diversity on the other hand should be recalled: in the first case there is a strong mainstreaming clause, namely Art. 11 TFEU, capable of strengthening and concretely implementing the statement contained in Art. 3(3) TEU, while in the second one the cultural mainstreaming clause, namely Art. 167(4) TFEU, appears to

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716 Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2023/C 259/01, OJ C 259, 21.7.2023, 1.

717 As noted by BLOCKX, J., *Should European competition law only care about clean air for Europeans*?, in Kluwer Competition Law Blog, 1.4.2022, the lack of reference to a collective interest and the focus only on consumer welfare, both implied by the interpretation of the fair share criterion given by the Commission, would in the end frustrate the sustainability goals which the Commission itself seeks «Indeed, I would contend that the exclusive focus of European competition law on consumer benefits (understood in a narrow sense as fulfilling consumer desires) is what makes that body of law hard to reconcile with several legitimate public policy concerns which are caused by unbridled consumerism (some but not all of which can be subsumed under the term "sustainability"). Obviously, the consumer welfare standard is a standard that is easier to apply (and easier to apply consistently across the members of the European Competition Network) than a broader standard of justice or fairness, but if the consumer welfare standard leads to iniquitous outcomes, it needs to be set aside, at least in this case»).

718 See IACOVIDES, M. C., STYLIANOU, K., *The new goals of EU competition law: sustainability, labour rights and privacy*, in European Law Open, 2024, vol. 3, 587-616.

719 See for example Case M.8084, *Bayer/Monsanto*, C(2018) 1709 final, 21.3.2018.

be considerably weaker, by providing that cultural aspects shall be *taken into account* by the Union.

The different force characterising Art. 11 on the one hand and other cross-sectional clauses such as Art. 167(4) on the other is rather common – being for example detectable if Art. 9 TFEU[720] is examined – but its consequences are quite relevant. While with regard to environmental protection some Authors, on the basis exactly of Art. 11 TFEU and Art. 3(3) TEU, managed to assert the existence of a proper constitutional imperative placed upon the EU to incorporate sustainability and environmental protection in all its policies, with the consequence that EU competition law shall positively pursue them and integrate them in its objectives[721], the same perspective could not be adopted when addressing other objectives which do not have the same degree of constitutional protection, such as cultural diversity.

When pursuing the latter, as once more showed by the resale price maintenance schemes in the book sector, the Commission will then tendentially use the competition law's paradigm, inevitably setting aside considerations which are stranger to this logic. In other words, also in this case it would seem an overhasty conclusion to affirm that the mere choice to apply Art. 101 TFEU in the light of Art. 167(4) can be considered as a proof of a *culturally corrected* market economy. On the contrary – from the perspective of antitrust discipline – it would seem more adequate to speak of a *culturally oriented* market economy, as through the enforcement of EU antitrust provisions cultural objectives can be indeed pursued – as showed by some examples taken from the Commission's decisional practice explicitly referring to Art. 167(4)– , but at the same time, apart from the fact that a tendency to overlap cultural and consumer welfare considerations can be often detected, in some cases there might be a cultural dimension bound to succumb to the economic one[722], or at least bound not to be fully acknowledged, as for example showed by the lack of reference to qualitative analyses to be carried out in order to check the actual variety of cultural contents offered by the companies involved in the assessed agreements.

In spite of such drawbacks, one of the most effective ways to respect (or, at least, not to completely disregard) the duty enshrined in Art. 167(1) TFEU still seems to be exactly the use of instruments – such as, the present case, antitrust provisions –

[720] «In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health»

[721] IACOVIDES, M.C., VRETTOS, C., *Falling through the Cracks No More? Article 102 TFEU and Sustainability: The Relation between Dominance, Environmental Degradation, and Social Injustice,* in *Journal of Antitrust Enforcement*, 2022, vol. 10, issue 1, 32-62., 43.

[722] However, as pointed out with regard to the geo-blocking measures in the audiovisual sector, the same tendency can be also noticed in the field of copyright law, where market considerations have long had the upper hand on more traditional copyright functions, more tightly intertwined with cultural and social concerns.

grounded in the economic paradigm, the same economic paradigm which, in State aid, prevents a clear-cut distinction between measures compatible with and falling outside of Art. 107 TFEU.

This is where the cultural mainstreaming clause comes into play. Although undeniably weaker in force if compared to provisions such as Art. 11 TFEU, the latter can be nonetheless considered as a partial counterpart to the weak EU competence in the cultural field[723], and that through its capability of making other tools – based on stronger competences and potentially rooted on a diametrically opposed economic logic – more culturally oriented.

Indeed, while modifying the wording of Art. 167(4) to make it more similar to Art. 11 – therefore increasing the constitutional relevance of culture – does not appear to be feasible, and that also because of the disruptive effect which such modification would have given the reference to *national* cultures which can be found in Art. 167, a more realistic strategy to effectively – even though indirectly – pursue cultural goals appears to be introducing cultural considerations in other fields of EU action where the latter enjoys a stronger competence, such as competition policy. As it has been multiple times recalled, the final result of such integration exercise might at time prove to be not fully satisfactory – and that because of the contrast with the economic paradigm guiding competition law itself –, nevertheless a provision such as the cultural mainstreaming clause, in order to be effective and to enhance cultural considerations, often needs to lean on EU actions based on more robust competences, which can be ironically built exactly upon such economic paradigm.

A fitting illustration of this dynamic is illustrated by geo-blocking restrictions. Indeed, Art. 167(4) alone does not seem capable of putting an end to copyright's territoriality – and that also in the light of its weak wording –, on the contrary it requires to rely on a stronger instrument of EU action, in this case the prohibition of anticompetitive agreements, being in turn Art. 101 at odds with geo-blocking practices not for their effect on access to cultural contents but for their repercussions in terms of integrity of the digital single market.

In conclusion, antitrust rules and cultural considerations might (and at times should, for the interest of the latter) work in tandem. What appears fundamental is not misinterpreting such coupling as a proof of the culturally corrected character of the EU market economy. Rather, from the cultural policy's perspective, it should be more regarded as a marriage of convenience, in which antitrust instruments are employed – even though with the physiological limitations which have been pointed out – to pursue aims which otherwise Art. 167 TFEU could not achieve alone.

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[723] In these terms B. DE WITTE, *Integration clauses – a comparative epilogue*, in F. IPPOLITO et al. (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, London, Routledge, 2014, 183.

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